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January 21, 2010

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**E-FILED**

Cynthia T. Brown  
Chief, Section of Admin.,  
Office of Proceedings  
Surface Transportation Board  
395 E Street, S.W.  
Washington, DC 20024

ENTERED  
Office of Proceedings

JAN 21 2010

Part of  
Public Record

**Re: STB Finance Docket No. 35225  
San Benito Railroad LLC – Acquisition Exemption –  
Certain Assets of Union Pacific Railroad Company**

Dear Ms. Brown:

Enclosed for filing in the above-captioned proceeding is a revised Usage Agreement filed on behalf of San Benito Railroad LLC ("San Benito") (attached as Exhibit A). This version is redlined to show changes from the form Usage Agreement previously filed in this docket. We also are providing a copy of the Trackage Rights Agreement (referenced in the revised Usage Agreement) that pertains to property north of the subject line (attached as Exhibit B). Neither the changes to the revised Usage Agreement nor the Trackage Rights Agreement are relevant to the issues presented in San Benito's Motion to Dismiss the Notice of Exemption currently before the Board. San Benito, through its counsel, previously provided copies of the revised Usage Agreement and Trackage Rights Agreement to the Brotherhood of Maintenance of Way Employees Division/IBT, through its counsel Mr. Richard Edelman, on January 14, 2010 and January 19, 2010, respectively. Mr. Edelman has no objection to submission of both agreements for filing in this docket.

In addition, pursuant to the Board's order in STB Ex Parte No. 693 (STB served Dec. 1, 2009), Kevin M. Sheys will be presenting argument on behalf of San Benito. San Benito requests that five (5) minutes of its 20 minute argument time be reserved for rebuttal.

Please let me know if you have any questions.

Respectfully submitted,

  
Janie Sheng  
Attorney for San Benito Railroad LLC

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Cynthia T. Brown  
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Attachments

cc: Richard S. Edelman, Esq.

EXHIBIT A

EXECUTION COPY

**Exhibit 2 to Letter Amendment dated December 15, 2009**

**Usage Agreement**

**USAGE AGREEMENT --- HOLLISTER BRANCH**

THIS USAGE AGREEMENT ("Agreement") dated as of \_\_\_\_\_, 20020, is entered into by and between Union Pacific Railroad Company, a Delaware corporation ("Seller"), and San Benito Railroad LLC, a California limited liability company ("Purchaser").

**RECITALS:**

~~A. A.~~ Seller and Purchaser have entered into an Option Agreement dated September 4, 2001 (the "Option Agreement"), pursuant to which Seller has granted Purchaser an option to acquire the railroad line and right-of-way commonly known as the Hollister Branch, between the UP Coast Main Line in the vicinity of M.P. 0.07 and the current stub end of the track, near Park Street, in the vicinity of M.P. 12.50 in Hollister, California, located in the County of San Benito, State of California, as described in Exhibit A, hereto, together with certain improvements, fixtures, trackage and structures located thereon, and certain contract and other rights relating thereto, all of which are included in the definition of "Property" as further defined in the Option Agreement. ~~If Purchaser exercises its option and acquires the Property upon the terms and conditions set forth in the Option Agreement, Seller and Purchaser shall execute this Agreement, which shall be effective upon the Closing of Purchaser's acquisition of the Property (the "Effective Date").~~

~~B. B.~~ Purchaser has acquired the Property for the purpose of providing passenger rail service (through a designated third-party operator) and for any purpose other than those purposes reserved exclusively to Seller in the Option Agreement (the "Retained Rights").

~~C. C.~~ Seller has retained a perpetual and exclusive easement (the "Freight Easement") to provide common carrier freight rail service on the Joint Trackage (as defined in Section 1

below). Purchaser has agreed to permit Seller to continue such freight rail service on the terms set forth herein.

~~D.~~ D. Purchaser and Seller desire to set forth their respective rights and obligations with respect to the Joint Trackage, including the terms and conditions governing Seller's provision of common carrier freight rail service on the Joint Trackage.

~~E.~~ — NOW, THEREFORE, it is mutually agreed by and between the parties hereto as follows:

**SECTION 1. SECTION 1. DEFINITIONS.**

"Agreement" shall mean this Usage Agreement by and between Union Pacific Railroad Company and San Benito Railroad LLC.

"Changeover Date" shall mean the date, if any, on which Purchaser elects to assume responsibility for maintenance and dispatching on the Joint Trackage or any portion thereof, as set forth in a written notice provided by Purchaser to Seller thirty (30) days prior to the assumption of such responsibility.

"Changes and/or Additions" shall mean any improvements to the Joint Trackage constructed after the Effective Date, including but not limited to additions, betterments, and any construction, reconstruction, alteration and modification thereto, and any retirements to the Joint Trackage, but excluding ordinary maintenance, repair and renewal of the Joint Trackage.

"Effective Date" shall mean the date of execution of this Agreement, ~~which shall coincide with the Closing of Purchaser's acquisition of the Property under the Option Agreement (as the term "Closing" is defined therein).~~

"Environmental Laws" shall mean any and all applicable laws, statutes, regulations, enforceable requirements, order, decrees, judgments, injunctions, permits, approvals,

authorizations, licenses, permissions or binding agreements issued, promulgated or entered by any governmental agency having jurisdiction over the Joint Trackage, relating to the environment or relating to the management, release or threatened release of contaminants or noxious orders, including, without limitation, the Hazardous Materials Transportation Act, the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), the Resource Conservation and Recovery Act, the Toxic Substances Control Act, the Solid Waste Disposal Act, the Clean Air Act, the Clean Water Act, and any similar or implementing federal, state or local law, and all amendments or regulations promulgated thereunder.

"Equipment" shall mean trains, locomotives, passenger cars, freight cars (loaded or empty), intermodal units (loaded or empty) or cabooses in the account, possession, custody or control of a party. Equipment shall also mean vehicles and other machinery capable of being operated on railroad tracks or on right-of-way for purposes of maintenance, repair or renewal of such railroad tracks.

"Excluded Conduct" shall have the meaning set forth in Section 6.

"Freight Easement" shall mean the perpetual and exclusive common carrier freight railroad easement that Seller reserved from its conveyance of the Property to Purchaser, as more particularly described in the Deed attached to the Option Agreement.

"Freight Operator" shall have the meaning set forth in Section 2.3.

"Hazardous Materials" shall mean any pollutant, toxic substance, hazardous waste, hazardous material, hazardous substance, oil or petroleum product as defined in or pursuant to the Resource Conservation and Recovery Act, as amended; the Comprehensive Environmental Response, Compensation, and Liability Act, as amended; the Toxic Substances Control Act, or any federal, state or local environmental law or regulation existing as of the date hereof.

**"Joint Trackage"** shall mean the railroad trackage located between the Coast Main Line in the vicinity of M.P. 0.07 and the current stub end of the track, near Park Street, in the vicinity of M.P. 12.50, in Hollister, California in the right-of-way described in Exhibit A. hereto, and all improvements, fixtures, and structures located thereon or appurtenant thereto as of the Effective Date, including but not limited to rails, ties, switches, bridges, culverts, tunnels, grade crossings, buildings, communication systems and signal systems.

**"Loss" or "Losses"** shall mean all losses, damages, claims, demands, costs, liabilities, judgments, fines, fees (including, without limitation, reasonable attorneys' fees) and expenses (including, without limitation, costs of investigation, expenses at arbitration, trial or appeal and without institution of arbitration or suit, and, with respect to damage or destruction of property, cleanup, repair and replacement expenses) of any nature arising from or in connection with (i) the death of or injury to persons, including, without limitation, employees of the parties; or (ii) damage to or destruction of property, including, without limitation, property owned by either of the parties hereto, in connection with freight rail service or passenger rail service on, over and upon the Joint Trackage.

**"Maintenance Fee"** shall have the meaning set forth in Section 4.1.

**"Operator"** shall have the meaning set forth in Section 2.3.

**"Option Agreement"** shall mean the Option Agreement dated September 4, 2001 by and between Union Pacific Railroad Company and San Benito Railroad LLC.

**"Passenger Service Commencement Date"** shall mean the date, if any, on which Purchaser (through its Operator) commences regularly scheduled, revenue passenger rail service on the Joint Trackage. The Passenger Service Commencement Date cannot occur prior to the Changeover Date.

"Property" shall have the meaning set forth in the Option Agreement.

"Purchaser" shall mean the San Benito Railroad LLC.

"Retained Rights" shall have the meaning set forth in the Option Agreement.

"Seller" shall mean the Union Pacific Railroad Company.

"STB" shall mean the Surface Transportation Board of the United States Department of Transportation or any successor federal agency.

"Trackage Rights Agreement" shall mean that certain Trackage Rights Agreement between the Parties governing certain Purchaser operations on the UP Coast Main Line.

"Trains" shall consist of one or more locomotive units with freight or passenger cars attached thereto or one or more self-propelled passenger cars.

## **SECTION 2. SECTION 2. RIGHTS OF PURCHASER AND SELLER.**

### **2.1-2.1 Purchaser's and Seller's Rights Generally.**

~~(a)-(a)~~ Pursuant to the Freight Easement, and subject to the terms and conditions of this Agreement, Seller has reserved and shall have the perpetual and exclusive right to provide common carrier freight rail service to current and future freight rail customers located on or adjacent to the Joint Trackage. Neither Purchaser nor any person or entity other than Seller (or its successors or assigns) shall be permitted to provide local, overhead or any other type of freight rail service on the Joint Trackage.

~~(b)-(b)~~ Except for the Retained Rights and any other rights provided to Seller under this Agreement, Purchaser shall have all of the rights incident to ownership of the Property and the Joint Trackage, including but not limited to the right to use the Joint Trackage for any purpose other than providing freight rail service and the right to rehabilitate, relocate or otherwise construct improvements on or adjacent to the Joint Trackage under the terms and



conditions set forth herein. Without limiting the generality of the foregoing, Purchaser shall have the right at any time on or after the Passenger Service Commencement Date and regardless of whether Purchaser has exercised its rights under the Trackage Rights Agreement to conduct passenger service on the Property.

2.2- 2.2 Freight Service.

~~(a)~~ (a) Seller currently provides and has the exclusive right and obligation to continue to provide common carrier freight rail service to customers located on or adjacent to the Joint Trackage. Seller shall have the right to use the Joint Trackage and any Changes and/or Additions to the Joint Trackage constructed by Seller in accordance with Section 2.4 to provide such common carrier freight rail service. Seller shall have the right to use any Changes and/or Additions to the Joint Trackage constructed by Purchaser for switching operations for current and future local customers, including all normal and customary railroad operations in connection therewith ("Switching Operations"). Subject to the foregoing right of Seller, Seller shall not have the right to use any Changes and/or Additions to the Joint Trackage constructed by Purchaser for any purposes other than Switching Operations. Seller shall provide Purchaser with advance written notice, as soon as is reasonably practicable, if Seller intends to provide freight rail service to any customer located on or adjacent to the Joint Trackage that is not currently being served by Seller from the Joint Trackage as of the Effective Date of this Agreement. If Seller materially extends or increases its freight rail service obligations with respect to customers located on or adjacent to the Joint Trackage, it shall provide advance written notice thereof to Purchaser as soon as is reasonably practicable. Notwithstanding such notice, and except as otherwise provided herein, Purchaser shall have no right to veto any such extension of freight rail service.

~~(b)-(b)~~ Seller expressly retains and Purchaser expressly declines to assume any obligation to provide freight rail service to customers located on or adjacent to the Joint Trackage, any common carrier obligation or any other obligation with respect thereto.

2.3 2.3 Third Party Operators. It is understood and agreed by the parties hereto that Purchaser has the right to designate a third party operator ("Operator") to exercise its operating and related rights under this Agreement. ~~The parties agree that the~~ If Purchaser designates an Operator shall be other than the same entity that is operating the Caltrain San Francisco-San Jose Gilroy service at the time of such designation, and thereafter, any successor operator of such service, entity that is or would be the Operator under the Trackage Rights Agreement, Purchaser shall select a qualified Operator. Seller shall have the right to approve such Operator, which approval shall be at Owner's sole discretion. For purposes of this Agreement, the term "Purchaser" shall be deemed to include or to mean and refer to the "Operator," and the term "Purchaser's employees" (or any similar reference) shall be deemed to include or to mean and refer to the "Operator's employees," unless the context requires otherwise. In addition, any reference herein to a "party" or the "parties" to this Agreement shall be deemed to include the Operator, unless the context requires otherwise. The Seller's operating and related rights under this Agreement can be exercised by a designated third-party operator ("Freight Operator") only in accordance with Section 11 herein. Both parties and their respective operators, if any, shall comply with any and all governmental regulations, and all terms and conditions of this Agreement.

2.4 2.4 Seller's Right to Make Changes and/or Additions.

~~(a)-(a)~~ Seller shall have the right, at its sole cost and expense, to design and construct Changes and/or Additions to the Joint Trackage consisting solely of railroad-related

facilities reasonably necessary for and related to Seller's freight operations on the Joint Trackage; provided, however, that such Changes and/or Additions shall not unreasonably interfere with Purchaser's use or intended use of the Joint Trackage or the Property; provided, further, that Seller shall not have the right to construct additional trackage on the Property after the Effective Date without permission of Purchaser, which shall not be unreasonably withheld or delayed. Purchaser shall have the right to review and approve such Changes and/or Additions in accordance with subparagraph 2.4(b) below. In addition, Purchaser shall have right to use such Changes and/or Additions in accordance with the terms and conditions of this Agreement.

~~(b)~~ (b) Seller shall deliver copies of the design plans (including schematic designs and any engineering, structural, mechanical and construction plans and specifications) (collectively "Plans") relating to such Changes and/or Additions that it proposes to design and construct pursuant to subparagraph 2.4(a) at least ninety (90) days prior to commencing construction of such Changes and/or Additions. Purchaser shall have the right to reject such Plans if the proposed design would unreasonably interfere with Purchaser's use or intended use of the Joint Trackage or the Property. The parties shall use their best efforts to agree on appropriate modifications to such Plans in order to eliminate or minimize interference with Purchaser's use or intended use of the Joint Trackage or the Property. If the parties are unable to agree on appropriate modifications to such Plans, the matter shall be submitted to the dispute resolution process set forth in Section 7 herein.

~~(c)~~ (c) Seller shall construct such Changes and/or Additions that have been approved by Purchaser in accordance with subparagraph (b) at such times and in such a manner as to not unreasonably interfere with, delay or endanger passenger rail operations on the Joint Trackage or the Property. Purchaser's Trains or Equipment, or the Joint Trackage or Property

itself. Such construction shall be conducted in accordance with Seller's safety rules and construction standards and shall comply with all applicable laws, rules and regulations. Seller shall provide, at its sole cost and expense, appropriate protection to Purchaser's employees, passengers, Trains and Equipment during such construction.

**2.5-2.5 Purchaser's Right to Make Changes and/or Additions.**

~~(a)~~ (a) Purchaser shall have the right, at its sole cost and expense, to design and construct Changes and/or Additions to the Joint Trackage in its sole discretion. Purchaser shall provide Seller with ninety (90) days advance written notice prior to commencing the construction of such Changes and/or Additions. Purchaser shall construct such Changes and/or Additions at such times and in such a manner as to not unreasonably interfere with, delay or endanger Seller's freight rail operations on the Joint Trackage or Seller's Trains or Equipment located thereon. Purchaser shall provide, at its sole cost and expense, appropriate protection to Seller's employees, lading, Trains and Equipment during such construction.

~~(b)~~ (b) Purchaser shall be responsible for designing and constructing, at its sole cost and expense, any Changes and/or Additions to the Joint Trackage (including, without limitation, any track crossings or grade separations) that are required by any governmental agency, unless such Changes and/or Additions are required by such agency solely for or solely as a result of Seller's use of the Joint Trackage (in which event Seller shall be responsible for designing and constructing such Changes and/or Additions, at its sole cost and expense, and in compliance with the provisions of the preceding Section 2.4).

~~2.6~~ 2.6 Ownership of Changes and/or Additions. Purchaser shall own all Changes and/or Additions that are not expressly made the property of Seller under this Section 2.6. Seller shall own such Changes and/or Additions that are (i) sidings, industrial tracks, spur tracks or other improvements that are reasonably severable from the main corridor right-of-way and trackage of the Joint Trackage (ii) that are used solely to provide freight rail service on the Joint Trackage and (iii) that are made at Seller's sole cost and expense. Purchaser shall not remove any such Changes and/or Additions to the Joint Trackage without the prior written consent of Seller, which consent shall not be unreasonably withheld, conditioned or delayed. Within ninety (90) days of the abandonment of Seller's common carrier freight obligations on the Joint Trackage, Seller shall have the right (but not the obligation) to remove any Changes and/or Additions that it owns from the Joint Trackage and restore the Joint Trackage to its original condition as of the Effective Date. If Seller does not remove any such Changes and/or Additions within the ninety (90) day period, Purchaser shall have the right to request that Seller, at its sole cost and expense and within ninety (90) days, remove such Changes and/or Additions and restore the Joint Trackage to its original condition as of the Effective Date. Any Changes and/or Additions not removed by Seller in accordance with the foregoing sentence shall become the property of Purchaser.

### **SECTION 3. SECTION 3. OPERATIONS.**

#### **3.1 ~~3.1~~ Dispatching and Control.**

~~(a)~~ (a) Prior to the Changeover Date, the operation and dispatching of any and all Trains and Equipment of either party over and along the Joint Trackage shall be subject to the direction and control of Seller's train dispatchers and other authorized agents. Seller shall be responsible for such dispatching at its sole cost and expense. In performing its dispatching

responsibilities, Seller shall schedule and dispatch Trains and Equipment over and along the Joint Trackage in a safe, reliable and on-time manner, in a manner that minimizes disruption of Purchaser's passenger operations and other activities on the Joint Trackage, if any, and in a manner that complies with all applicable laws, regulations or rules (including reasonable operating rules as Seller shall, from time to time, institute in accordance with the terms and conditions of this Agreement). Seller shall provide Purchaser with reports and other information relating to Train and Equipment movements on the Joint Trackage as may be reasonably necessary for Purchaser to conduct activities on the Joint Trackage.

~~(b)~~ (b) Prior to the Changeover Date, Purchaser shall have access to the Joint Trackage for the purpose of surveying, inspecting or testing the Joint Trackage or for any other similar purpose, unless such other similar purpose could cause a work stoppage or other labor dispute on any of Seller's rail lines, upon giving reasonable notice to Seller; provided that, Purchaser shall not undertake any rehabilitation, construction or relocation activities thereon prior to the Changeover Date. During any period of access to the Joint Trackage by Purchaser for such purposes, if Purchaser reasonably requests, Seller shall issue notices of interrupted service, including embargo notices (with duration thereof to be specified by Purchaser) to affected customers located on or adjacent to the Joint Trackage. Any access or activity by Purchaser pursuant to this Section shall be coordinated with Seller to minimize interference with freight service, but Purchaser shall bear the financial cost of any such interruption relating to freight operations, including the costs of flagmen or safety signals. Purchaser shall hold harmless, indemnify and defend Seller from and against any cost, expense, claim or liability (other than labor disputes or claims) resulting from any such access or activities, including,

without limitation, claims by freight customers located on or adjacent to the Joint Trackage alleging failure to provide adequate freight service.

~~(e)~~ (c) Except as set forth in Section 3.1(a) and Section 3.1(b), the management and operation of the Joint Trackage shall, at all times, be under the exclusive direction and control of Purchaser and its authorized agents, and the dispatching of all Trains and Equipment of either party over and along the Joint Trackage shall, at all times, be subject to the exclusive direction and control of Purchaser's dispatcher and other authorized agents. Purchaser shall be responsible for such dispatching at its sole cost and expense. In performing its dispatching responsibilities, Purchaser shall schedule and dispatch Trains and Equipment over and along the Joint Trackage in a safe, reliable and on-time manner and in a manner that complies with all applicable laws, regulations or rules (including reasonable operating rules as Purchaser shall, from time to time, institute in accordance with the terms and conditions of this Agreement). Purchaser shall provide Seller with reports and other information relating to Train and Equipment movements on the Joint Trackage as may be reasonably necessary for Seller to conduct freight operations on the Joint Trackage.

~~(e)~~ (d) At least thirty (30) days prior to the Passenger Service Commencement Date, Purchaser shall determine the schedules for its Trains and shall provide such schedules to Seller. Prior to the Passenger Service Commencement Date, Seller shall reschedule its Trains, to the extent necessary, so as to minimize interference with Purchaser's scheduled Trains. Each party shall have a continuing obligation to notify the other of any changes to such Train schedules, and Seller shall have a continuing obligation to schedule its Trains so as to minimize interference with Purchaser's scheduled Trains.

~~(e)~~ (e) All operating and dispatching decisions affecting the movement of Trains and Equipment on the Joint Trackage shall give priority to passenger Trains.

~~(f)~~ (f) Neither party shall adopt, except by agreement with the other party (which shall not be unreasonably withheld, conditioned or delayed), a new communications system or signal system for use on the Joint Trackage which would adversely affect the other party's provision of its rail service, unless required by any statute, law, ordinance or governmental regulation.

~~(g)~~ (g) The parties hereby acknowledge that operating and management issues may arise from time to time with respect to the Joint Trackage and agree to meet and confer in good faith to discuss and resolve such issues upon the written request of either party.

### 3.2.3.2 Train Operations.

~~(a)~~ (a) Purchaser and Seller shall each be responsible for providing and operating their own Trains and Equipment on the Joint Trackage and each shall operate such Trains and Equipment in a safe manner. Each party shall be responsible for furnishing, at its sole cost and expense, all labor, fuel and other supplies necessary for the operations of its own Trains and Equipment over the Joint Trackage.

~~(b)~~ (b) Purchaser and Seller shall each comply with (i) all applicable laws, regulations or rules, state or federal, governing operations on, and the inspection, testing or safety of, the Joint Trackage, the Trains and Equipment thereon, and any personnel employed in the operation and maintenance thereof (including any laws relating to the transportation of Hazardous Materials applicable to their respective operations), and (ii) all of Purchaser's timetables, general orders and bulletins and other standards relating to such operation,



maintenance, condition, inspection, testing or safety, which timetables, general orders, bulletins and other standards shall be provided in writing by Purchaser to Seller.

~~(e)-(c)~~ Neither Purchaser nor Seller shall have any responsibility for inspecting, maintaining, servicing or repairing any Trains or Equipment used by the other party on the Joint Trackage. If, for any reason, Purchaser's or Seller's Trains or Equipment become stalled or disabled on the Joint Trackage and are unable to proceed, then the party whose Trains or Equipment are involved in the incident (the "Responsible Party") shall within a reasonable time furnish such assistance as may be necessary to haul, help, push or move such Trains or Equipment and clear the Joint Trackage. If the Responsible Party does not clear its Trains or Equipment from the Joint Trackage within a reasonable time, the other party may clear such Trains or Equipment from the Joint Trackage and obtain from the Responsible Party reimbursement of all reasonable costs incurred in so doing.

~~(d)-(d)~~ Purchaser shall, as soon as practicable, notify Seller of any investigation or hearing concerning the violation of any operating rule, safety rule, regulation, order or instruction of Purchaser by any employee of Seller. Such investigation or hearing may be attended by an official of Seller.

~~(e)-(e)~~ If in the exercise of any of its rights or performance of any of its obligations under this Agreement, Seller shall reasonably need to enter upon any portion of the Joint Trackage outside the normal course of freight operations, then Seller shall give reasonable notice to Purchaser of such entry, which notice shall be not less than forty-eight (48) hours in advance, except in the case of emergencies. Except in the case of emergencies, in no event shall Seller, or any of its agents, servants, employees, consultants or contractors, enter upon the Joint

Trackage outside the normal course of freight operations without having first received permission from Purchaser.

**SECTION 4. SECTION 4. MAINTENANCE.**

**4.1-4.1 Maintenance Obligations of Seller.**

~~(a)~~ (a) Prior to the Changeover Date, Seller shall at its sole cost and expense, and under its sole management and control, maintain the Joint Trackage to a level reasonably determined by Seller to be consistent with the use being made thereof by Seller. Such maintenance shall include, without limitation, the repair of trackage, structures and signals, installation of ties and ballast, surfacing work and replacement in-kind of existing facilities such as trackage, structures and signals. In conducting its maintenance obligations, Seller shall use reasonable and customary care, skill and diligence and shall comply with all applicable laws, regulations or rules.

~~(b)~~ (b) No more than ten (10) days after the Changeover Date, the parties shall conduct a joint inspection of the Joint Trackage. The date on which the joint inspection occurs shall be the Joint Inspection Date.

~~(c)~~ (c) As of the Changeover Date, Purchaser shall assume sole and exclusive responsibility for maintaining, under its sole management and control, the Joint Trackage at no less than the condition the Joint Trackage was in on the Joint Inspection Date. Such maintenance shall include, without limitation, the repair of trackage, structures and signals, installation of ties and ballast, surfacing work and replacement in-kind of existing facilities such as trackage, structures and signals. At such time as Purchaser elects to commence passenger rail service on the Joint Trackage, the Joint Trackage must be upgraded to minimum FRA Class III standards at Purchaser's sole cost and expense.

~~(d)-(d)~~ Following the Changeover Date, but prior to the Passenger Service Commencement Date, Seller shall pay to Purchaser a fee of \$60.00 per loaded car for each loaded car that moves over the Joint Trackage ("Maintenance Fee"). Seller and Purchaser further agree that the Maintenance Fee shall be increased or decreased on an annual basis (as of each anniversary of the Changeover Date) to reflect fifty percent (50%) of the change in the Rail Cost Adjustment Factor-Unadjusted from the corresponding quarter of the prior year.

~~(e)-(e)~~ As of the Passenger Service Commencement Date, the Maintenance Fee charged to Seller by Purchaser shall be terminated.

4.2 4.2 Failure to Maintain. In the event that either Purchaser or Seller (as appropriate, the "Maintaining Party") fails to fulfill any maintenance obligation under Section 4.1 of this Agreement, the other party shall be entitled to give written notice of such failure to the Maintaining Party. If the Maintaining Party has not performed such maintenance obligation within thirty (30) days after receipt of such notice, the other party may perform such maintenance obligation and shall be entitled to full reimbursement for the costs thereof from the Maintaining Party; provided, however, that if the Maintaining Party makes its best efforts to commence to cure such failure within such thirty (30) days, the period for cure shall be extended for so long as the Maintaining Party continues to make its best efforts to cure, but in no case longer than an additional thirty (30) days. The performance of any such maintenance obligation by the other party shall not be deemed or construed as an assumption of any other or ongoing maintenance obligations of the Maintaining Party.

#### **SECTION 5. SECTION 5. INSURANCE.**

~~(a)-(a)~~ Purchaser shall obtain and maintain general liability insurance with limits of liability applicable to bodily injury and property damage in the amount of at least

One Hundred Million Dollars (~~\$100,000,000.00~~) per occurrence and shall either include its Operator as insured under its policies or furnish evidence of separate insurance of the same amount and type for the Operator. Insurance shall be placed with a company or companies authorized to conduct business in California which has a current Best's Insurance Guide Rating of at least A, or its equivalent the insurance coverage specified on Exhibit B, which is attached hereto and made a part hereof. Purchaser may self-insure to an amount not to exceed ~~Five Hundred Thousand~~ One Million Dollars (~~\$500,000.00~~) 1,000,000.00 per occurrence provided that the total coverage limits (self insurance plus excess liability insurance) are at least ~~One~~ Two Hundred Million Dollars (~~\$100,000,000.00~~) per occurrence ~~200,000,000.00~~ per occurrence with an aggregate limit of not less than Two Hundred Million Dollars (\$200,000,000.00). CGL insurance must be written on ISO occurrence form CG 00 01 12 04 (or a substitute form providing equivalent coverage). Purchaser shall provide Seller with certified copies of its policies, as well as certificates of insurance and endorsements evidencing the coverage specified above on Exhibit B prior to the Passenger Service Commencement Date. The foregoing policy limit and self-insurance limit shall be adjusted by the parties every five (5) years to reflect industry standards, liability claim trends and market conditions, but in no event shall the total coverage ever be less than ~~One~~ Two Hundred Million Dollars (~~\$100,000,000.00~~) 200,000,000.00); provided that any adjustment in the policy limit shall be capped at ten (10) percent per adjustment period.

~~(b)~~ (b) Seller maintains, and shall obtain and continue to maintain at all times this Agreement is in effect, at its sole cost and expense, general liability insurance coverage, or self insurance, consistent with other railroads of similar size and operations a catastrophic risk management program, allowing for its diverse risk exposures and financial condition, and in

keeping with risks assumed by corporations of established size and reputation and consistent with programs of other Class I Railroads [as defined in 49 C.F.R. § 1201, subpart A, General Instruction 1-1(a)]. Such insurance coverage or self insurance shall be at least as comprehensive as the coverage provided by ISO form CG 00 01 10 93, with limits of liability applicable to bodily injury and property damage in the amount of at least One Hundred Million Dollars (\$100,000,000.00). If obtained from an insurance company or companies, such insurance shall be placed with a company or companies authorized to conduct business in California which has a current Best's Insurance Guide Rating of at least A, or its equivalent. Purchaser and its Operator shall be named as additional insureds (or treated as additional insured to the extent Seller is self insured) under Seller's coverage, in a form acceptable to Purchaser required of Purchaser under this Agreement. Seller shall provide Purchaser with certificates of insurance and copies of endorsements, or a letter of self insurance, evidencing such insurance coverage or self insurance within thirty (30) days after the Effective Date of this Agreement.

(e) ~~(c)~~ The general liability insurance or self insurance required by this Section 5 shall provide coverage for personal injury, bodily injury, death and property damage with respect to all arising out of operations of the Seller and/or Purchaser on the Joint Trackage. Such insurance shall include broad form from contractual liability coverage and shall be applicable to the indemnity provisions set forth in Section 6. ~~Any policy of general liability insurance obtained or maintained by the Purchaser shall provide a waiver of subrogation and shall name Seller as an additional insured with respect to any liability to be borne by the Purchaser pursuant to the provisions of Section 6-6 hereinafter.~~ Any policy of general liability insurance obtained or maintained by the Seller shall provide a waiver

of subrogation in favor of Purchaser and its Operator, and shall name Purchaser and its Operator as additional insureds with respect to any liability to be borne by the Seller pursuant to the provisions of Section 6; to the extent that Seller maintains self- insurance, Seller hereby waives its rights of subrogation against Purchaser and its Operator with respect to all claims which are covered by such self-insurance (or would have been covered had Seller purchased insurance), and agrees that Purchaser and its Operator shall be treated as additional insureds under Seller's ~~coverage, in a form acceptable to Purchaser's coverage.~~ Any policy of general liability insurance obtained or maintained by Purchaser shall provide a waiver of subrogation in favor of Seller, and shall name Seller as an additional insured with respect to any liability to be borne by the Purchaser pursuant to the provisions of Section 6

~~(d)~~ (d) The insurance (including self insurance) obtained or maintained pursuant to this Section shall be primary with respect to the liability obligations under this Agreement of the party obtaining the insurance and with respect to the interests of all parties added as additional insureds. Any other insurance maintained by an additional insured shall be excess of the coverage herein defined as primary and shall not contribute with it.

~~(e)~~ (e) Unless otherwise specified herein, the insurance required by this Section 5 shall be maintained by each party for the full term of this Agreement and to the expiration of applicable State(s) and Federal statutes of limitations allowing for claims against the Seller (except as otherwise provided in this Agreement) and shall not be permitted to expire or be canceled or materially changed except upon sixty (60) days' written notice to the other party. Each insurance policy required by this Section shall provide that coverage shall not be suspended, voided, canceled, or materially reduced in coverage or limits except after sixty (60)

days", prior written notice has been given to the insureds, including additional insureds provided for in this Agreement.

~~(f)~~ (f) Each party shall maintain workers' compensation and employers' liability insurance, with at least minimum required statutory limits, and in compliance with requirements of California and/or federal law.

~~(g)~~ (g) A failure of either party to obtain or maintain the insurance required by this Section shall not relieve such party of any of its liabilities or obligations under this Agreement.

**SECTION 6. SECTION 6. LIABILITY.**

**6.1 Assumption of Responsibility.**

~~(a)~~ (a) Each of the parties hereto shall assume, bear and pay any and all Losses allocated to it as the responsible party under the terms of this Section 6. Except as otherwise expressly provided in Sections 6.2(b)(v) and 6.3, the responsibility for Losses allocated to each party under this Section 6 is without respect to fault, failure, negligence, misconduct, malfeasance or misfeasance of any party or its employees, agents or servants.

~~(b)~~ (b) All costs and expenses incurred in connection with the investigation, adjustment and defense of any claim or suit pertaining to a Loss shall be included as part of any Loss for which responsibility is assumed under the terms of this Section 6, but not including salaries or wages and associated benefits of ~~and out of pocket expenses~~ incurred by or with respect to, employees of either party or employees of the Operator or the Freight Operator engaged directly in such investigation, adjustment and defense work and a reasonable amount of allocated salaries and wages of employees providing support services to such employees so engaged directly in such work.

6.2 6.2 Allocation of Responsibilities.

~~(a)~~ (a) Except as otherwise expressly provided in Section 6.3, Losses arising out of personal injury (including bodily injury and death) to, or property damage suffered by, an invitee of either party shall be the responsibility of and borne and paid solely by that party regardless of the cause of such Loss ~~or, the fault of either party, or the party~~ whose Equipment was involved. For purposes of this paragraph, consultants and contractors of a party and any person who is on Equipment operated by or for the account of a party as a passenger or otherwise (other than an employee of a party engaged in performing duties for that party) shall be deemed to be an invitee of that party. In addition, all persons at any passenger station or passenger-loading platform located on or adjacent to the Joint Trackage shall be deemed to be invitees of Purchaser (other than employees, contractors, and consultants, including employees of such contractors and consultants, of Seller engaged in performing duties for Seller).

~~(b)~~ (b) Except as otherwise expressly provided in Section 6.3, Losses arising out of personal injury (including bodily injury and death) to, or property damage suffered by, persons other than invitees of either Purchaser or Seller and casualty losses to property owned by Purchaser or Seller shall be the responsibility of and borne and paid by the parties as follows:

~~(i)~~ (i) Loss to Equipment and Loss of other property owned, leased or exclusively used by Purchaser shall be the responsibility of the Purchaser and borne by it.



- ~~(ii)~~ (ii) Loss to Equipment and Loss of other property owned, leased or exclusively used by, and freight transported by, Seller shall be the responsibility of Seller and borne by it.
- ~~(iii)~~ (iii) Loss to property jointly used by both parties shall be the responsibility of and borne and paid by the parties as follows:
- ~~(A)~~ (A) totally by the party whose Equipment was involved in the incident giving rise to the Loss if the Equipment of only one party was involved in the incident giving rise to such Loss;
- ~~(B)~~ (B) equally by the parties if the Equipment of both parties was involved in the incident giving rise to the Loss; and
- ~~(C)~~ (C) by the party that owns the real property on which the Loss occurred when no Equipment of either party was involved in the incident giving rise to such Loss.
- ~~(iv)~~ (iv) Losses arising out of personal injury (including bodily injury and death) to, or property damage suffered by, any employee of either party which occurs during the course of employment or while traveling to or from employment shall be the responsibility of and borne solely by the party employing such employee.
- ~~(v)~~ (v) Losses arising out of personal injury (including bodily injury and death) to, or property damage suffered by, any person who is not an employee or invitee of either party (including, without limitation, persons using vehicular and pedestrian crossings and trespassers), including without limitation ~~Losses consisting of property damages suffered by either party~~

arising out of the explosion, combustion, leakage, spillage or release of Hazardous Materials by or in connection with the operations of or service provided by a party or its agents, employees, customers or consignees on the Joint Trackage or other real property, shall be the responsibility of and borne (A) totally by the party whose Equipment was involved in the incident giving rise to such Loss if the Equipment of only one party was involved in the incident giving rise to such Loss, (B) by Purchaser if no Equipment of either party was involved in the incident giving rise to such Loss and the incident occurred on the Joint Trackage, and (C) by both parties in proportion to their relative degrees of fault if the Equipment of both parties was involved in the incident giving rise to such Loss; provided, however, that ~~Losses consisting of property damages suffered by either party hereto arising out of the explosion, combustion, leakage, spillage or release of Hazardous Materials by or in connection with the operations of or service provided by a party (the "Responsible Party") or its agents, employees, customers or consignees on the Joint Trackage or other real property shall be borne by the Responsible Party.~~

- (vi) ~~(vii)~~ Except as provided in Section 3.1(b), Losses arising out of claims by freight rail customers located on or adjacent to the Joint Trackage for failure to provide adequate freight service or for violation of freight service agreements shall be the responsibility of and borne by Seller.

**6.3 6.3 Limitations on Indemnification.** The provisions of this Section 6.3 shall apply notwithstanding the provisions of Section 6.2 above. ~~"Excluded Conduct" shall mean (i) an entire failure of care or the exercise of so slight a degree of care as to raise a presumption that there was a conscious indifference to the things and welfare of others, (ii) conduct constituting a reckless or wanton disregard of the probable results of such conduct, (iii) willful misconduct, or (iv) conduct which would permit the~~ "shall mean conduct by a supervisory level or higher level employee of one of the parties, when such conduct is alleged in a properly filed complaint by a plaintiff or plaintiffs as the basis for an award of exemplary or punitive damages under California law, and actually results in an award of exemplary or punitive damages by a jury after trial of the issues and exhaustion of judicial appeals. Neither party shall be indemnified for any Loss to the extent resulting from its own Excluded Conduct, and in any such case such party shall be responsible for and bear the Loss in proportion to its relative degree of fault and ~~such party shall be responsible for and bear all~~ exemplary or punitive damages, if any, to the extent resulting from its Excluded Conduct. If any ~~of the provisions of Section 6.2 would be prohibited by a court or a public policy of the State of California (including a determination that indemnification under the circumstances involved is against the public policy of the state)~~ the indemnity provided by such provision shall be deemed to be limited to and operative only to the maximum extent permitted by law. Without limitation, if it is determined that any law or public policy of the State of California prohibits the indemnification of a party for its own sole negligence in any instance covered by the provisions of Section 6.2, these provisions shall be deemed to exclude indemnification for such party's sole negligence but to permit full indemnification as specified in Section 6.2, if both parties were negligent. In

~~the case of any Loss for which the provisions of this Section 6.3 would prevent the indemnification of a party, such party shall be responsible for and bear such Loss. any asserts that the other party is guilty of Excluded Conduct and denies liability for indemnification of the other party based thereon, the party asserting such Excluded Conduct shall have the burden of proof in establishing such conduct.~~

**6.4 6.4 Scope of Indemnification.** In any case where a party is required under the provisions of this Section 6 to bear a Loss, it shall pay, satisfy and discharge such Loss and all judgments or orders that may be rendered by reason thereof and all costs, charges and expenses incident thereto. In addition, such party shall forever indemnify, defend and hold harmless the other party and its directors, officers, agents, employees, shareholders, parent corporation and affiliated companies from, against and with respect to any and all such Losses, irrespective of the fault or negligence of the indemnified party. ~~If a party asserts that the other was guilty of Excluded Conduct and denies liability for indemnification of the other party based thereon, the party asserting such Excluded Conduct shall have the burden of proof in establishing such conduct.~~

**6.5 6.5 Procedure.**

~~(a) (a)~~ If any claim or demand shall be asserted by any person against an indemnified party under this Section 6, the indemnified party shall, within thirty (30) days after notice of such claim or demand, cause written notice thereof to be given to the indemnifying party, provided that failure to notify the indemnifying party shall not relieve the indemnifying party from any liability which it may have to the indemnified party under this Section 6, except to the extent that the rights of the indemnifying party are in fact prejudiced by such failure. If any such claim or demand shall be brought against the indemnified party and it shall have given

notice thereof to the indemnifying party, the indemnifying party shall have the right, at its own expense, to control (including the selection of counsel reasonably satisfactory to the indemnified party) or to participate in the defense of, negotiate or settle, any such claim or demand, and the parties hereto agree to cooperate fully with each other in connection with any such defense, negotiation or settlement. In any event, neither the indemnified party nor the indemnifying party shall make any settlement of any claim or demand which might give rise to liability on the part of the other party under this Section 6 without the prior written consent of such other party, which consent shall not be unreasonably withheld, conditioned or delayed. If any claim or demand relates to a matter for which the parties, under the terms of Section 6.2, are to share liability equally or in proportion to their relative degrees of fault, each party shall be entitled to select its own counsel and defend itself against the claim or demand at its own expense, and neither party shall make any settlement of any such claim or demand without the prior written consent of the other party, which consent shall not be unreasonably withheld, conditioned or delayed.

~~(b)-(b)~~ Subject to the provisions of Section 6.5 (a), on each occasion that the indemnified party shall be entitled to indemnification or reimbursement under this Section 6, the indemnifying party shall, at each such time, promptly pay the amount of such indemnification or reimbursement. If the indemnified party shall be entitled to indemnification under this Section 6 and the indemnifying party shall not elect to control any legal proceeding in connection therewith, the indemnifying party shall pay to the indemnified party an amount equal to the indemnified party's reasonable legal fees and other costs and expenses arising as a result of such proceeding.

~~(e)~~ (c) Any dispute between the parties as to the right to indemnification or the amount to which it is entitled pursuant to such right with respect to any matter shall be submitted to arbitration pursuant to Section 7; provided, however, that if either party or both parties are named as defendants, third party defendants, cross-claim defendants or are otherwise named as parties to a lawsuit or other legal proceeding initiated by a third party, and such proceeding involves or relates to such indemnification rights, then either party shall have the right to pursue the resolution of such indemnification issues in that proceeding instead of through the arbitration procedures set forth in Section 7.

~~6.6~~ 6.6 Third Party Operators. The Operator and the Freight Operator shall agree to be bound by the provisions of this Section 6 unless otherwise agreed to in writing by Purchaser and Seller. For purposes of this Section 6, as between Purchaser and Seller, the Equipment and actions of any entity acting on behalf of and for the account of a party hereto (including without limitation the Operator and the Freight Operator) shall be deemed to be the Equipment and actions of such party hereto. Nothing contained herein shall be construed to limit or waive the rights of a party hereto to seek indemnification or damages from said entities acting on its behalf for the actions of said entities.

~~6.7~~ 6.7 Not For Benefit Of Third Parties. The provisions of this Section 6 are not intended to confer any right, benefit, or cause of action upon any third party and are intended solely to deal with the allocation of liability, if any, as between the parties to this Agreement.

#### **SECTION 7. DISPUTE RESOLUTION AND BINDING ARBITRATION.**

~~(a) — Both of the parties hereto shall make every reasonable effort to settle any disputes arising out of their respective rights and obligations under this Agreement through prompt and diligent negotiations. If at any time a question or~~

~~controversy shall arise between the parties hereto in connection with the Agreement that the parties cannot resolve, such question or controversy shall be submitted to and settled by arbitration. Unless other procedures are agreed to by the parties, arbitration between the parties pursuant to this Section 7 shall be governed by the rules and procedures set forth in this Section 7.~~

~~(b) If the parties to the dispute are able to agree upon a single disinterested arbitrator within twenty (20) days after written notice by one party of its desire for arbitration to the other party, then the question or controversy shall be submitted to and settled by that single arbitrator. Otherwise, any party (the "notifying party") may notify the other party (the "noticed party") in writing of its request for arbitration and its nomination of one disinterested arbitrator. Within twenty (20) days after receipt of said notice, the noticed party shall appoint a disinterested arbitrator and notify the notifying party in writing of such appointment. Should the noticed party fail within twenty (20) days after receipt of such notice to name its arbitrator, said arbitrator may be appointed by the Chief Judge (or acting Chief Judge) of the United States District Court for the Northern District of California upon application by either party after ten (10) days' written notice to the other party. The two arbitrators so chosen shall select one additional disinterested arbitrator to complete the board. If the arbitrators so chosen fail to agree upon an additional arbitrator, the same shall, upon application of a party, be appointed by said judge in the manner heretofore stated.~~

~~(c) Upon selection of the arbitrator(s), said arbitrator(s) shall, with reasonable diligence and subject to the rights of the parties under subparagraph 7(f), determine the questions as disclosed in said notice of arbitration, give both parties~~

~~reasonable notice of the time and place (of which the arbitrator(s) shall be the judge) of hearing evidence and argument, take such evidence as the arbitrator(s) shall deem reasonable or as either party may submit with witnesses required to be sworn, and hear arguments of counsel or others. If an arbitrator declines or fails to act, the party (or parties in the case of a single arbitrator) by whom the arbitrator was chosen or said judge shall appoint another to act in the arbitrator's place.~~

6.8 Enforceability. If any of the provisions of this Section 6 would be prohibited by or unenforceable under the laws of the State of California (including a determination that indemnification under the circumstances involved is against the public policy of the state), the indemnity provided by such provision shall be deemed to be limited to and operative only to the maximum extent permitted by law. Without limitation, if it is determined that any law or public policy of the State of California prohibits the indemnification of a party for its own sole negligence in any lawsuit covered by the provisions of this Section 6, these provisions shall be deemed to exclude indemnification for such party's sole negligence but to permit full indemnification as specified in this Section 6, if both parties were negligent.

#### **Section 7. Binding Arbitration.**

~~(d) After considering all evidence, testimony and arguments, said single arbitrator or the majority of said board of arbitrators shall promptly state such decision or award and the reasoning for such decision or award in writing which shall be final, binding, and conclusive on all parties to the arbitration when delivered to them. The award rendered by the arbitrator(s) may be entered as a judgment in any court having jurisdiction thereof and enforced as between the parties without further evidentiary proceeding, the same as entered by the court at the conclusion of a judicial proceeding~~



~~in which no appeal was taken. Until the arbitrator(s) shall issue the first decision or award upon any question submitted for arbitration, performance under the Agreement shall continue in the manner and form existing prior to the rise of such question. After delivery of said first decision or award, each party shall forthwith comply with said first decision or award immediately after receiving it.~~

7.1 Controversies Subject to Arbitration. Any and all claims, disputes or controversies between Purchaser and Seller arising out of or concerning the interpretation, application, or implementation of this Agreement that cannot be resolved by the parties through the Coordination Committee or by negotiations shall be submitted to binding arbitration administered by the American Arbitration Association ("AAA") under its Commercial Arbitration Rules, except as otherwise provided in this Section 7. If the AAA discontinues promulgation of the Commercial Arbitration Rules, the parties shall use the AAA's designated successor rules, and if the AAA does not designate successor rules, the parties shall agree on other rules. The judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof as a final, non-appealable judgment.

7.2 Selection of Arbitrator. In the event a claim, dispute or controversy arises, either party may serve a written demand for arbitration upon the other party. If the claim, dispute or controversy is not resolved by the parties within thirty (30) days after the service of the demand, the matter shall be deemed submitted to arbitration. If within forty (40) days after service of the demand, the parties have not selected a single arbitrator, each party shall within an additional ten (10) days thereafter select an arbitrator. (In such case, if either party has not selected an arbitrator within ten (10) days after receipt of notice that the other party has selected an arbitrator, the arbitrator selected by the other party shall arbitrate the claim, dispute or controversy.) The two selected arbitrators shall select a third arbitrator. If the two arbitrators are

unable to agree upon the third arbitrator within ten (10) days of the selection of the two selected arbitrators, the AAA shall select the third arbitrator. The arbitrator(s) shall be disinterested.

7.3. Expedited Arbitration Schedule.

(a) In the event either party reasonably finds that the issues of any claim, dispute or controversy are likely to directly, imminently, materially and adversely affect human health or safety, either party may request, in the arbitration demand delivered pursuant to Section 7.2, an expedited arbitration procedure as set forth in this Section 7.3 solely for the purpose of obtaining a provisional remedy that by law or in equity could be imposed in a court proceeding against a rail carrier subject to STB jurisdiction (e.g., temporary restraining order, preliminary injunction or injunction).

(b) Within five (5) days after service of a demand for expedited arbitration, the parties shall agree on an arbitrator. If the parties fail to agree on an arbitrator within such five-day period, each party shall within two (2) days select an arbitrator. In such case, if either party has not selected an arbitrator within two (2) days after receipt of notice that the other party has selected an arbitrator, the arbitrator selected by the other party shall arbitrate the claim, dispute or controversy. The two selected arbitrators shall select a third arbitrator. If the two arbitrators are unable to agree upon the third arbitrator within two (2) days of the deadline for the selection of the two selected arbitrators, the AAA shall select the third arbitrator. The arbitrator(s) shall be disinterested.

(c) The expedited arbitration hearing shall commence no later than ten (10) days after service of a demand for expedited arbitration and shall be concluded on the same day. The arbitration decision shall be rendered by the arbitrator(s) in writing on or before the day following the arbitration hearing.

(d) Prior to rendering any decision, the arbitrator must find that the issues of the claim, dispute or controversy are likely to directly, imminently, materially and adversely affect human health or safety. In the event the arbitrator finds that the foregoing criteria have not been met, the proceeding shall be dismissed without prejudice and the parties shall proceed with the arbitration procedure and schedule set forth in Sections 7.1 and 7.2; provided, however, that no new demand for arbitration need be served by the party demanding arbitration.

7.4 Pending Resolution, During the pendency of such arbitration proceedings, the business and the operations to be conducted, and compensation for service under this Agreement, to the extent that they are the subject of such controversy, shall continue to be transacted, used and paid in the manner and form existing prior to the arising of such controversy, unless the arbitrator shall make a preliminary ruling to the contrary.

~~(e) Each party to the arbitration shall pay all compensation, costs, and expenses of the arbitrator appointed in its behalf and all fees and expenses of its own witnesses and counsel. The compensation, cost, and expenses of the single arbitrator or the additional arbitrator in the board of arbitrators shall be paid in equal shares by all parties to the arbitration.~~

~~(f) The parties may obtain discovery and offer evidence in accordance with the Federal Rules of Civil Procedure Rules 26-37, and Federal Rules of Evidence, as each may be amended from time to time.~~

7.5 Cost of Arbitration. Each party solely shall bear the attorneys' fees, costs and expenses incurred by it in connection with such arbitration; provided, however, the arbitrator shall have the power to award attorneys' fees and costs to either party if the arbitrator determines in its reasonable discretion that the position of the other party to the arbitration was frivolous.

**SECTION 8. SECTION 8. TERM AND ABANDONMENT.**

Seller may not abandon or discontinue its common carrier freight rail service on the Joint Trackage except in accordance with this Section 8. At any time, Seller may elect to abandon or discontinue such freight rail service. In the event that Seller applies for and receives STB authority to abandon or discontinue common carrier freight service on the Joint Trackage, or in the event such service is otherwise abandoned or discontinued, Seller's Freight Easement shall be extinguished, Seller shall execute, acknowledge and deliver to Purchaser an instrument in recordable form reasonably acceptable to Purchaser under which Seller quitclaims to Purchaser all of Seller's right, title and interest in the Freight Easement and Seller's rights under this Agreement shall terminate.

**SECTION 9. SECTION 9. PROPERTY TAXES.**

To the extent any real property taxes are payable with respect to any portion of the Joint Trackage by reason of Seller's use thereof in accordance with this Agreement, Seller will pay, to the extent required to do so, such real property taxes prior to delinquency and shall protect, defend, indemnify and hold Purchaser harmless from and against any and all liability, loss, cost, damage or expense (including, without limitation, reasonable attorneys' fees) Purchaser may sustain or incur on account of any such real property taxes by reason of this provision.

**SECTION 10. SECTION 10. COMPENSATION AND BILLING.**

~~(a)~~ (a) Invoices submitted to the parties under this Agreement ("Invoices") must be itemized with a detailed description of the work performed, the date of such work, the time expended and the associated hourly billing rate or charge for such work, and any reimbursable expenses (including, without limitation, the cost of materials used) incurred in the performance of the work. The party requesting reimbursement shall certify that it has actually incurred the

[illegible]

expenses set out in its Invoice. Invoices for reimbursable expenses may not exceed the out-of-pocket expense for such items including customary additives. Invoices shall be paid within thirty (30) days after receipt thereof by the payor. If a party disputes any items on an Invoice, that party may deduct the disputed item from the payment, but shall not delay payment for the undisputed portions. The amounts and reasons for such deductions, if any, shall be documented to the other party within thirty (30) days after receipt of the Invoice. Once documentation is given for the disputed amounts, and accepted by the paying party, the disputed amounts shall be paid by the paying party with thirty (30) days after receipt of the documentation. No Invoice shall be submitted later than three (3) years after the last day of the calendar month in which the reimbursable expense or cost covered thereby is incurred.

~~(b)-(b)~~ So much of the books accounts, and records (except for privileged or confidential records) of each party hereto as are related to the subject matter of this Agreement shall at all reasonable times be open to inspection by the authorized representatives and agents of the parties. All accounting records and other supporting papers shall be maintained for a minimum of three (3) years from the date thereof. If work relating to this Agreement is funded in whole or in part by a federal grant, the Comptroller General of the United States and authorized representatives of the federal agency furnishing the grant shall have the right to examine and audit such books, accounts, and records in accordance with applicable federal laws and regulations.

~~(e)-(c)~~ Upon request, a party disputing the accuracy of any Invoice shall be entitled to receive from the invoicing party copies of such supporting documentation and/or records as are kept in the ordinary course of the invoicing party's business and which are reasonably necessary to verify the accuracy of the Invoice as rendered.

**SECTION 11. SECTION 11. ASSIGNMENT.**

Purchaser may assign or sell any of its rights and obligations under this Agreement to any (i) entity owned or controlled by, or under common control with, Purchaser or (ii) municipality or other governmental entity of the State of California without the consent of Seller; provided that Purchaser shall give Seller thirty (30) days advance written notice of any such assignment. Unless otherwise agreed by the parties, and subject to the requirements of Section 4.3 of the Option Agreement, Seller may assign or sell all but not less than all of its rights and obligations under this Agreement to: (i) any other Class I Railroad; or (ii) any experienced shortline railroad operator with a demonstrated record of reliable and safe railroad operating experience; provided, however, that Seller, not less than thirty (30) days prior to such assignment or sale, has given Purchaser written evidence reasonably satisfactory to Purchaser that such successor or assign (A) has the legal power and authority to undertake all of the rights and obligations of Seller hereunder, (B) has the financial capacity to fulfill Seller's obligations under this Agreement (including the capacity to pay for damages), and (C) is a Class I railroad or an experienced shortline railroad operator with a demonstrated record of reliable and safe railroad operating experience.

**SECTION 12. SECTION 12. DEFAULT.**

~~(a)~~ (a) Notwithstanding the provisions of Section 10, either party hereto claiming default of any of the provisions of the Agreement shall furnish notice and written demand to the other party for performance or compliance with the covenant or condition of the Agreement claimed to be in default, which notice shall specify wherein and in what respect such default is

claimed to exist and shall specify the particular Section or Sections of the Agreement under which such claim of default is made.

~~(b)~~ (b) If the default shall continue for an additional period of thirty (30) days after receipt of such written notice and demand, and such default has not been remedied within said thirty (30) day period, or reasonable steps have not been nor continue to be taken to remedy a failure or default which cannot reasonably be remedied within said thirty (30) day period, and such default relates to the provisions and terms of the Agreement, either party may resort to arbitration under the provisions of Section 7, provided, however, that the arbitrator shall not have the authority to amend, modify or terminate this Agreement.

~~(c)~~ (c) Failure of a party to claim a default shall not constitute a waiver of such default. Either party hereto entitled to claim default may waive any such default, but no action by such party in waiving such default shall extend to or be taken to effect any subsequent defaults or impair the rights of either party hereto resulting therefrom.

**SECTION 13. SECTION 13. MISCELLANEOUS PROVISIONS.**

~~13.1~~ 13.1 Successors and Assigns. This Agreement and each and every provision hereof is for the benefit of the parties hereto and their successors and assigns only, and shall not be deemed to inure to the benefit of any third parties. Nothing herein shall be construed to create or increase any right in any third party to recover by way of damages or otherwise against either of the parties hereto.

~~13.2~~ 13.2 Notices. Except as otherwise expressly provided in this Agreement, all notices and other communications under this Agreement shall be in writing and shall be deemed to have been duly given (a) on the date of delivery, ~~if delivered personally to the party to whom notice is given~~ or if sent by overnight courier, or ~~if made by telecopy directed to the~~



applicable telecopy number listed below and the transmission is confirmed by mail as provided under (b) below which is deposited on the first business day after the transmission, or (b) at the earlier of actual receipt or the third business day (b) three business days following deposit in the United States mail, postage prepaid, as evidenced by a return receipt. Notices and other communications shall be directed to the parties at the addresses shown below. A party may change its person designated to receive notice, ~~its telecopy number~~ or its address from time to time by giving notice to the other party in accordance with the procedures set forth in this Section.

If to Purchaser: San Benito Railroad LLC  
ATTN: Philip R. Taylor  
535 Cowper Street  
Second Floor  
Palo Alto, CA 94301  
Telephone: (650) 614-9203  
Facsimile: (650) 833-6903

With copies to: Gray Cary Ware & Freidenrich LLP  
3340 Hillview Avenue  
Palo Alto, CA 94304  
Attn: Patrick J. McGaraghan  
Telephone: (650) 833-2030  
Facsimile: (650) 833-2304

and

Kirkpatrick & Lockhart LLP  
1800 Massachusetts Avenue N.W.  
Washington, D.C. 20036  
Attn: Kevin M. Sheys  
Telephone: (202) 778-9000  
Facsimile: (202) 778-9100

If to Seller: Union Pacific Railroad Company

ATTN: Richard Gooch  
45 Stevenson Street, 15<sup>th</sup> Floor  
San Francisco, CA 94105  
Telephone: (415) 541-7050  
Facsimile: (415) 541-7060

With a copy to: General Manager Joint Facilities and Passenger Operations  
Union Pacific Railroad Company  
1416 Dodge Street  
Omaha, NE 68179

If to Purchaser: San Benito Railroad LLC  
ATTN: Philip R. Taylor  
535 Cowper Street  
Second Floor  
Palo Alto, CA 94301  
Telephone: (650) 614-9203  
Facsimile: (650) 833-6903

With copies to: DLA Piper US LLP  
2000 University Avenue  
East Palo Alto, CA 94303-2248  
Attn: Patrick J. McGaraghan  
Telephone: (650) 833-2030  
Facsimile: (650) 833-2001

and  
K&L Gates LLP  
1601 K Street NW  
Washington, D.C. 20006-1600  
Attn: Kevin M. Sheys  
Telephone: (202) 778-9000  
Facsimile: (202) 778-9100

If to Seller: Union Pacific Railroad Company  
ATTN: Richard Gooch  
50 California Street, Suite 1563  
San Francisco, CA 94111  
Telephone: (415) 439-5345

With a copy to: General Manager  
Joint Facilities and Passenger Operations  
Union Pacific Railroad Company

1400 Douglas Street - STOP 1180  
Omaha, NE 68179-1180

~~13.3~~ 13.3 Headings. The section and subsection headings in this Agreement are for convenience only and shall not be used in its interpretation or considered part of this Agreement.

~~13.4~~ 13.4 Integration, Amendment, and Waiver.

This Agreement is the entire agreement, and supersedes all prior and contemporaneous agreements, representations, and understandings, of the parties concerning the subject matter hereof. No supplement, modification, or amendment of this Agreement shall be binding unless executed in writing by both of the parties. No waiver of any provision of this Agreement shall be deemed, or shall constitute, a waiver of any other provisions, whether or not similar, nor shall any waiver constitute a continuing waiver. No waiver shall be binding unless executed in writing by the party making the waiver.

~~13.5~~ 13.5 Counterparts. This Agreement may be executed in any number of counterparts, and by different parties in separate counterparts, each of which, when executed and delivered, shall be deemed to be an original and all of which counterparts taken together shall constitute but one and the same instrument.

~~13.6~~ 13.6 Governing Law. This Agreement shall be construed and interpreted in accordance with the laws of the State of California.

~~13.7~~ 13.7 Attorneys Fees. If any legal action or any arbitration or other proceeding is brought for the enforcement or interpretation of this Agreement, or because of an alleged dispute, breach, default or misrepresentation in connection with any of the provisions of this Agreement, the prevailing party or parties shall be entitled to recover reasonable attorneys' fees and other costs in connection with that action or proceeding, in addition to any other relief to which it or they may be entitled.

~~43.8~~ 13.8 Force Majeure. Each party will be excused from the performance of any of its obligations hereunder to the other party where such nonperformance is occasioned by any event beyond its control, which shall include without limitation, any order, rule or regulation of any federal, state, or local governmental body, agency or instrumentality, natural disaster, work stoppage, or civil disorder, provided the party so excused hereunder shall use all reasonable efforts to minimize its nonperformance and to overcome, remedy, cure, or remove such event as soon as reasonably practicable.

~~43.9~~ 13.9 Catastrophic Expense. Catastrophic expense to the Joint Trackage, including but not limited to that arising from flood, earthquake or other acts of God, in excess of One Hundred Thousand Dollars (~~\$400,000~~ 100,000.00) (as adjusted annually in the same manner as the fee in Section 4.1(d) hereof) for each occurrence shall be billed and apportioned on the basis of the parties' respective number of trains operated over the Joint Trackage during the twelve (12) month period ending immediately prior to the first day of the month of the occurrence; provided, however, that in lieu of paying any such amount billed to Seller, Seller shall have the right to extinguish its Freight Easement and terminate this Agreement in accordance with Section 8 hereof.

13.10 Severability. Any provision of this Agreement which is determined by a court of competent jurisdiction to be invalid or unenforceable shall be invalid or unenforceable only to the extent of such determination, which shall not invalidate or otherwise render ineffective any other provision of this Agreement.

IN WITNESS WHEREOF, the parties to this Agreement have duly executed it as of the day and year first above written.

UNION PACIFIC RAILROAD COMPANY

SAN BENITO RAILROAD LLC

\_\_\_\_\_  
Title: Title:

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**Exhibit A**

[To follow - description of Hollister Branch]



**EXHIBIT "B"**

**Union Pacific Railroad**  
**Contract Insurance Requirements**

**Sale of Branch Line**  
**Passenger Operations**

Buyer shall, at its sole cost and expense, procure and maintain from the date of sale to the expiration of applicable State(s) and Federal statutes of limitations allowing for claims against the seller (except as otherwise provided in this Agreement) the following insurance coverage:

**A. Commercial General Liability Insurance.** Commercial general liability (CGL) with a limit of not less than \$200,000,000 each occurrence and an aggregate limit of not less than \$200,000,000. CGL insurance must be written on ISO occurrence form CG 00 01 12 04 (or a substitute form providing equivalent coverage).

**B. Umbrella or Excess Insurance.** If Buyer utilizes umbrella or excess policies, these policies must "follow form" and afford no less coverage than the primary policy.

**Other Requirements**

**D. All policy(ies) required above must include Railroad as "Additional Insured" using ISO Additional Insured Endorsement CG 20 26 (or a substitute form providing equivalent coverage). The coverage provided to Railroad as additional insured shall, to the extent provided under ISO Additional Insured Endorsement CG 20 26 provide coverage for Railroad's negligence whether sole or partial, active or passive, and shall not be limited by Buyer's liability under the indemnity provisions of this Agreement.**

**E. Punitive damages exclusion, if any, must be deleted (and the deletion indicated on the certificate of insurance), unless (a) insurance coverage may not lawfully be obtained for any punitive damages that may arise under this agreement, or (b) all punitive damages are prohibited by all states in which this agreement will be performed.**

**F. Prior to purchase of the property, Buyer shall furnish Railroad with a certificate(s) of insurance, executed by a duly authorized representative of each insurer, showing compliance with the insurance requirements in this Agreement.**

**G. All insurance policies must be written by a reputable insurance company acceptable to Railroad or with a current Best's Insurance Guide Rating of A- and Class VII or better, and authorized to do business in the state(s) in which the work is to be performed.**

**H. The fact that insurance is obtained by Buyer or by Railroad on behalf of Buyer will not be deemed to release or diminish the liability of Buyer, including, without limitation, liability under the indemnity provisions of this Agreement. Damages recoverable by Railroad from Buyer or any third party will not be limited by the amount of the required insurance coverage.**

Document comparison done by DeltaView on Monday, January 04, 2010 1:42:30 PM

Input:	
Document 1	PowerDocs://DC/459503/14
Document 2	PowerDocs://DC/1360059/10
Rendering set	Standard

Legend:	
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Split/Merged cell	
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Statistics:	
	Count
Insertions	410
Deletions	375
Moved from	10
Moved to	10
Style change	0
Format changed	0
Total changes	805

**TRACKAGE RIGHTS AGREEMENT**

THIS TRACKAGE RIGHTS AGREEMENT ("Agreement"), made and entered into this \_\_\_\_ day of \_\_\_\_\_, 20\_\_, by and between UNION PACIFIC RAILROAD COMPANY, a Delaware corporation, hereinafter called "UP" or "Owner," and SAN BENITO RAILROAD LLC, a California limited liability company, hereinafter called "San Benito RR" or "User."

**WITNESSETH:**

WHEREAS, UP is the owner of a certain line of railroad extending between the Gilroy, California CalTrain Station, Coast Main Line **MP 78.4**, and the junction with the Hollister Branch at Carnadero, California, Coast Main Line **MP 79.66**, a distance of 1.26 miles, and from **MP 0.0 to MP 0.06** on the Hollister Branch; and

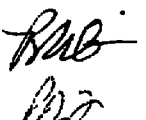
WHEREAS, User desires to obtain trackage rights upon said line of railroad, for the sole purpose of providing (through a designated third-party operator) passenger train service to and from the Hollister Branch; and

WHEREAS, UP is agreeable to said trackage rights but only on the terms and conditions hereinafter set forth.

NOW, THEREFORE, it is mutually agreed by and between the parties.

**SECTION 1. TRACKAGE SUBJECT TO AGREEMENT.**

Attached hereto, marked Exhibit "A" and by this reference incorporated herein, is a print dated \_\_\_\_\_, 20\_\_, which depicts the portion of line of railroad of UP over which User will be granted trackage rights between points "A" and "B," hereinafter referred to as the "Joint Trackage" (as further defined in the Exhibit "B" General Conditions of this Agreement, attached hereto and by this reference incorporated herein). If there are any inconsistencies between this



Agreement and the Exhibit B General Conditions, the terms and conditions of this Agreement shall be deemed to control, except that the definition of "Joint Trackage" as set forth in Section 1.7 of the General Conditions shall prevail.

**SECTION 2. GRANT OF TRACKAGE RIGHTS.**

(a) Subject to the terms and conditions of the Option Agreement dated September 4, 2001, and this Agreement (including any Exhibits hereto), UP grants to the User the right, through its designated third-party operator, to use the Joint Trackage for the operation of not more than four (4) round-trip passenger trains (loaded or empty) per day over the Joint Trackage.

(b) It is understood and agreed by the parties hereto that any operating rights and related rights granted to User under this Agreement shall be exercised by a third-party operator (the "Operator"). For purposes of this Agreement, the term "User" shall be deemed to include or to mean and refer to the "Operator," and the phrase "User's employees" (or any similar reference) shall be deemed to include or to mean and refer to the "Operator's employees," unless the context requires otherwise. In addition, any reference herein to a "party" or the "parties" to this Agreement shall be deemed to include the Operator, unless the context requires otherwise. The parties agree that the Operator shall be the same entity that is from time to time operating the CalTrain San Francisco-San Jose-Gilroy service at the time of such designation, and thereafter, any successor operator of such service, unless a different entity is providing passenger service between San Jose and Gilroy, in which case that entity shall be the Operator. If such entity is not willing and able to be the Operator or there is no such entity operating the CalTrain San Francisco-San Jose-Gilroy service, Purchaser shall select a qualified alternative entity to be the Operator and Owner shall have the right to approve such alternative entity, which approval shall be at Owner's sole discretion.

(c) User's use of the Joint Trackage shall be in common with UP and such other railroad company or companies as UP has heretofore admitted or may hereafter at any time admit to the joint use of any and all of the Joint Trackage, provided that UP shall not admit any other railroad companies to the Joint Trackage if such admittance would deprive User (or its Operator) of the right to use the Joint Trackage under the terms and conditions of this Agreement.

- (d) It is understood and agreed that User shall not have the right to:
- (i) perform any freight railroad service on or from the Joint Trackage; or
  - (ii) set out, pick up or store cars, or switch upon the Joint Trackage, or any part thereof, except as necessary for handling Equipment (as such term is defined in Exhibit B) that is bad ordered enroute on the Joint Trackage; or
  - (iii) serve any industry, team or house track now existing along the Joint Trackage; or
  - (iv) permit or admit any third party (other than Operator) to the use of all or any portion of the Joint Trackage, nor have the right to detour Equipment of any other railroad (other than Operator) over or upon the Joint Trackage, nor under the guise of doing its own business make any agreement to handle as its own Equipment over or upon the Joint Trackage, or any portion thereof, the Equipment of any third party which in the normal course of business would not be considered the Equipment of User or its Operator.

**SECTION 3. MAINTENANCE AND OPERATION EXPENSES.**

(a) So long as UP is continuing to provide freight service on the Hollister Branch, User shall not be required to pay to Owner any maintenance fee for use of the Joint Trackage.

(b) In the event that Owner shall abandon or discontinue its common carrier obligation to provide freight service to and from the Hollister Branch and User shall continue to use the Joint Trackage to provide passenger service to and from the Hollister Branch, then User shall pay to Owner a use of tracks fee that shall be calculated in accordance with terms of the Altamont Commuter Express Service Agreement dated August 25, 1997.

**SECTION 4. INCREASE IN PASSENGER TRAINS.**

User anticipates making a request to Owner to increase the number of passenger trains that User is authorized to operate over the Joint Trackage. Whether pursuant to the anticipated request or otherwise, any increase in the number of passenger trains that User is authorized to operate over the Joint Trackage under this Agreement will be subject to UP's approval, at its sole discretion. If UP determines that additional improvements to the Joint Trackage and an increase in access fees are required to accommodate any approved request to increase the number of passenger trains User is authorized to operate over the Joint Trackage, such improvements and payment of an increase in access fees shall be a pre-condition to User's operation of such additional passenger trains and User agrees that such additional improvements shall be subject to review and approval by UP's Engineering Department, shall be completed to the satisfaction of UP, and shall not result in any cost or expense to UP.

**SECTION 5. TERM AND TERMINATION.**

This Agreement shall be effective on the date of execution (hereinafter referred to as the "Effective Date") and shall continue until Ninety-Nine (99) years after the Passenger Service Commencement Date.

**NOTWITHSTANDING THE FOREGOING, EVEN THOUGH FULLY EXECUTED BY BOTH PARTIES HERETO, THIS AGREEMENT SHALL NOT BECOME EFFECTIVE UNLESS AND UNTIL THE FOLLOWING HAS OCCURRED:**

**(i) the improvements to the Coast Main listed on Exhibit D attached hereto and made part hereof have been completed by Owner and Owner has been fully reimbursed by User for all cost and expense in connection therewith; (ii) User has paid to Owner the Coast Main Line Access Fee of One Million Dollars (\$1,000,000.00); and (iii) User has an approved Operator in place to commence operations.**

**SECTION 6. SEVERABILITY / EXHIBITS**

Any provision of this Agreement which is determined by a court of competent jurisdiction to be invalid or unenforceable shall be invalid or unenforceable only to the extent of such determination, which shall not invalidate or otherwise render ineffective any other provision of this Agreement.

This Agreement is subject to each and all of the terms, provisions, conditions, limitations and covenants set forth herein and in Exhibit B, Exhibit C and Exhibit D attached hereto and hereby made a part hereof.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement in duplicate the day and year first above written.

\_\_\_\_\_  
WITNESS

By: \_\_\_\_\_  
SAN BENITO RAILROAD LLC

*RAB*  
*On 2.*

EXECUTION COPY

WITNESS: \_\_\_\_\_

By: \_\_\_\_\_  
UNION PACIFIC RAILROAD COMPANY

*FLB*  
*107*



EXECUTION COPY

**EXHIBIT "A"**

[To follow - print of the "Joint Trackage"]

*RM*  
*On. 7*

**EXHIBIT "B"**

**GENERAL CONDITIONS**

**SECTION 1. DEFINITIONS.**

1.1 "Agreement" shall mean this Trackage Rights Agreement by and between Union Pacific Railroad Company and San Benito Railroad LLC.

1.2 "Changes in and/or Additions to" shall mean any improvements to the Joint Trackage constructed after the Effective Date, including but not limited to additions, betterments and additional facilities, any construction, reconstruction, alteration and modification thereof, and any retirements to the Joint Trackage, but excluding ordinary maintenance, repair and renewal of the Joint Trackage.

1.3 "Environmental Laws" shall mean any and all applicable laws, statutes, regulations, enforceable requirements, order, decrees, judgments, injunctions, permits, approvals, authorizations, licenses, permissions or binding agreements issued, promulgated or entered by any governmental agency having jurisdiction over the Joint Trackage, relating to the environment or relating to the management, release or threatened release of contaminants or noxious orders, including, without limitation, the Hazardous Materials Transportation Act, the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), the Resource Conservation and Recovery Act, the Toxic Substances Control Act, the Solid Waste Disposal Act, the Clean Air Act, the Clean Water Act, and any similar or implementing federal, state or local law, and all amendments or regulations promulgated thereunder.

1.4 "Equipment" shall mean trains, locomotives, passenger cars, freight cars (loaded or empty), intermodal units (loaded or empty) or cabooses in the account, possession, custody or control of a party. Equipment shall also mean vehicles and other machinery capable of being

operated on railroad tracks or on right-of-way for purposes of maintenance, repair or renewal of such railroad tracks.

1.5 "GTMs" shall mean gross ton miles, which is the weight in tons for Equipment (and lading) transported over one (1) mile of track included in the Joint Trackage.

1.6 "GTM Handled Proportion" shall mean the GTMs handled over the Joint Trackage by or for a party divided by the total number of GTMs handled by or for all parties using the Joint Trackage during the same period. For the purpose of computing such GTM Handled Proportion, Equipment engaged in work service pertaining to construction, maintenance or operation of the Joint Trackage or Changes in and/or Additions to the Joint Trackage shall not be counted and GTMs of third parties shall be attributed to the Owner.

1.7 "Hazardous Materials" shall mean any pollutant, toxic substance, hazardous waste, hazardous material, hazardous substance, oil or petroleum product as defined in or pursuant to the Resource Conservation and Recovery Act, as amended; the Comprehensive Environmental Response, Compensation, and Liability Act, as amended; the Toxic Substances Control Act, or any federal, state or local environmental law or regulation existing as of the date hereof.

1.8 "Joint Trackage" shall mean the segment of Owner's railroad line that is described in Exhibit A to the Agreement, including the right-of-way and all appurtenances and improvements thereto and structures and facilities located thereon, including but not limited to rails, ties, switches, bridges, culverts, tunnels, grade crossings, buildings, signals, communication systems and related facilities, and all Changes in and/or Additions to said railroad line.

1.9 "Loss" or "Losses" shall mean all losses, damages, claims, demands, costs, liabilities, judgment, fines, fee (including, without limitation, reasonable attorneys' fees) and

expenses (including, without limitation, costs of investigation, expenses at arbitration, trial or appeal and without institution of arbitration or suit, and, with respect to damage or destruction of property, cleanup, repair and replacement expenses) of any nature arising from or in connection with (i) the death of or injury to persons, including, without limitation, employees of the parties; or (ii) damage to or destruction of property, including, without limitation, property owned by either of the parties hereto, in connection with freight rail service or passenger rail service on, over and upon the Joint Trackage.

1.10 "Operator" shall have the meaning set forth in Section 2 of the Agreement, it being understood and agreed by the parties hereto that Operator shall exercise any and all operating rights and related rights granted hereunder to User.

1.11 "Owner" shall have the meaning given to it in the Agreement.

1.12 "Passenger Service Commencement Date" shall mean the date on which Purchaser (through its Operator) commences regularly scheduled, revenue passenger rail service on the Joint Trackage or the Third Main.

1.13 "STB" shall mean the Surface Transportation Board of the United States Department of Transportation or any successor agency.

1.14 "User" shall have the meaning given to it in the Agreement.

**SECTION 2. MAINTENANCE, ADDITIONS, OPERATION, AND CONTROL.**

2.1 Owner shall have sole charge of the maintenance, repair and renewal of the Joint Trackage with its own supervisors, labor, materials and equipment at Owner's sole cost and expense. Subject to Section 2.2, Owner shall make such Changes in and/or Additions to the Joint Trackage as shall be required by any law, rule, regulation or ordinance promulgated by any government body having jurisdiction over the Joint Trackage or as Owner, *in its sole* discretion,

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shall deem necessary; provided, however, that such Changes in and/or Additions to the Joint Trackage shall not unreasonably interfere with User's use or intended use of the Joint Trackage. Owner shall bear the entire cost of any Changes in and/or Additions to the Joint Trackage unless Owner can demonstrate that such Changes in and/or Additions would not have been imposed if Owner, and not User or any other passenger rail operator, were operating over the Joint Trackage. Such Changes in and/or Additions to the Joint Trackage shall become a part of the Joint Trackage or in the case of retirements shall be excluded from the Joint Trackage.

2.2 Unless otherwise mutually agreed to by the parties in writing, Owner shall keep and maintain the Joint Trackage on a consistent basis at no less than the track standard designated in the UP timetable in effect on the date of execution of the Agreement; provided, that if any governmental body having jurisdiction over the Joint Trackage promulgates a law, rule, regulation or ordinance requiring lower operating speeds for the track standard designated in the UP timetable in effect on the date of execution of this Agreement, UP shall not have an obligation to keep and maintain the Joint Trackage at a higher level than such track standard. In the event that User desires that the Joint Trackage be improved to a condition in excess of the standard set forth in this Section 2.2, or desires that other Changes in and/or Additions to be made to the Joint Trackage, Owner, in its sole discretion, shall make such Changes in and/or Additions to the Joint Trackage if funded in advance by User. Thereafter, such Changes in and/or Additions to the Joint Trackage shall become part of the Joint Trackage or in the case of retirements shall be excluded from the Joint Trackage.

2.3 Owner shall employ all persons necessary to construct, operate, maintain, repair and renew the Joint Trackage. Owner shall be bound to use reasonable and customary care, skill and diligence in the construction, operation, maintenance, repair and renewal of the Joint

Trackage and in managing of the same. Owner shall make its best effort to ensure that User is given the same advance notice of construction and/or maintenance plans and schedules as is provided to Owner's personnel.

2.4 Trackage rights granted hereunder shall give User access to and joint use of the Joint Trackage. Except as otherwise provided herein, the management, operation (including dispatching) and maintenance of the Joint Trackage shall, at all times, be under the exclusive direction and control of Owner, the movement of Equipment over and along the Joint Trackage shall at all times be subject to the exclusive direction and control of Owner's authorized representatives and in accordance with such reasonable operating rules as Owner shall from time to time institute. Owner shall treat Owner and User equally in the management, operation (including dispatching) and maintenance of the Joint Trackage, except that passenger trains shall be given a priority over freight trains. User shall, at User's sole cost and expense, obtain, install and maintain necessary communications equipment to allow User's Equipment to communicate with Owner's dispatching and signaling facilities. Owner shall consult with User prior to the adoption of new communication or signaling systems to be employed on the Joint Trackage.

2.5 Except as otherwise may be provided in Section 6, if the use of the Joint Trackage shall at any time be interrupted or traffic thereon or thereover be delayed for any cause, neither party shall have or make any claim against the other for loss, damage or expense caused by or resulting solely from such interruption or delay.

2.6 Owner may from time to time provide any track or tracks other than those delineated in Exhibit A to the Agreement for use by User, provided there shall at all times be afforded User a continuous route of equal utility for the operations of its Equipment between the termini of the Joint Trackage. When such tracks which are not part of the Joint Trackage are

used as provided herein, this Agreement shall govern User's use of such tracks as if all movement had been made over the Joint Trackage.

2.7 Each party shall be responsible for furnishing, at its sole cost and expense, all labor, fuel and other supplies necessary for the operation of its own Equipment over the Joint Trackage. In the event a party does furnish such labor, fuel or other supplies to another party, the party receiving the same shall promptly, upon receipt of billing therefor, reimburse the party furnishing the same for its reasonable costs thereof, including customary additives.

2.8 Except as may be specifically provided for in this Agreement, nothing herein contained is intended to change practices with respect to UP's interchange of traffic with other carriers on or along the Joint Trackage.

2.9 Except as otherwise may be provided in the Agreement, User shall operate its Equipment over the Joint Trackage with its own employees, but before said employees are assigned or permitted to operate Equipment over the Joint Trackage as herein provided, and from time to time thereafter as and when reasonably requested by Owner, they shall be required to pass the applicable rules examinations required by Owner of its own employees. Owner shall delegate to specified User's officers the conduct of such examinations in the event User chooses to conduct such examinations. If an Owner officer conducts such examinations of employees of User, User shall pay Owner a reasonable fee for each employee so examined, such fee to be mutually agreed upon by the parties from time to time in a separate agreement. Notwithstanding any such examination, User shall be responsible for ensuring that its employees are qualified and have taken all such rules examinations. Upon request of User, Owner shall qualify one or more of User's supervisory officers as pilots and such supervisory officer or officers so qualified shall qualify employees of User engaged in or connected with User's operations on or along the Joint

Trackage. At User's request, Owner shall furnish a pilot or pilots, at the expense of User, to assist in operating trains of User over the Joint Trackage. Should Owner ever require a pilot on User's Equipment after the initial start-up period of User's operations on the Joint Trackage on a frequent basis, the parties shall use their best efforts to agree upon the terms and conditions applicable to such a pilot and any disputes relating thereto shall be resolved in accordance with Section 5.

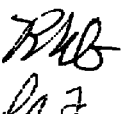
2.10 If any employee of User shall neglect, refuse or fail to abide by Owner's rules, instructions and restrictions governing the operation on or along the Joint Trackage, such employee shall, upon written request of Owner, be prohibited by User from working on the Joint Trackage. If either party shall deem it necessary to hold a formal investigation to establish such neglect, refusal or failure on the part of any employee of User, then upon such notice presented in writing, Owner and User shall promptly hold a joint investigation in which the parties concerned shall participate and bear the expense for their respective officers, counsel, witnesses and employees. Notice of such investigations to User's employees shall be given by User's officers, and such investigations shall be conducted in accordance with the terms and conditions of any applicable schedule agreements. If, in the judgment of Owner, the result of such investigation warrants, such employee shall, upon written request by Owner, be withdrawn by User from service on the Joint Trackage, and User shall release and indemnify Owner from and against any and all claims and expenses arising from such withdrawal.

If the disciplinary action is appealed by an employee of User to the National Railroad Adjustment Board or other tribunal lawfully created to adjudicate such cases, and if the decision of such board or tribunal sustains the employee's position, such employee shall not thereafter be barred from service on the Joint Trackage by reason of such disciplinary action.

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2.11 If any Equipment of User is bad ordered (as that term is generally understood in the railroad industry) enroute on the Joint Trackage and (i) it is necessary that it be set out, and (ii) only light repairs to the Equipment are required, such bad ordered Equipment shall be promptly repaired, and, thereafter, be promptly removed from the Joint Trackage by User. Owner may, upon request of User and at User's sole cost and expense, furnish the required labor and material and perform light repairs to make such bad ordered Equipment safe for movement. Such repairs shall be billed as provided for in Section 3 of these General Conditions. The employees and Equipment of Owner while in any manner so engaged or while enroute to or returning to Owner's terminal from such an assignment shall be considered the employees and property of User for purposes of Section 6. However, should Owner's employees after repairing such bad ordered Equipment for User move directly to perform service for Owner's benefit rather than return to Owner's terminal, then User's exclusive time and liability will end when Owner's employees depart for work to be performed for Owner's benefit. In the case of such repairs by Owner to freight cars in User's account, billing therefor shall be in accordance with the Field and Office Manuals of the Interchange Rules, adopted by the Association of American Railroad ("AAR"), hereinafter called "Interchange Rules", in effect on the date of performance of the repairs. Owner shall then prepare and submit billing directly to and collect from the car owner for car owner responsibility items as determined under said Interchange Rules, and Owner shall prepare and submit billing directly to and collect from User for handling line responsibility items as determined under said Interchange Rules. Owner also shall submit billing to and collect from User any charges for repair to User's Equipment that are User's car owner responsibility items as determined under said Interchange Rules, should said car owner refuse or otherwise fail to make

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payment therefor. Repairs to locomotives shall be billed as provided for in Section 3 of these General Conditions.

2.12 If Equipment of User shall become derailed, wrecked, or otherwise disabled while upon the Joint Trackage (other than bad ordered Equipment subject to light repairs pursuant to Section 2.11), it shall be rerailed or cleared by Owner, except that User may rerail User's derailed Equipment on the Joint Trackage whenever use of motorized on or off track equipment is not required; however, in any such case, User shall consult with and be governed by the directions of Owner. Owner reserves the right to rerail Equipment of User when, in the judgment of Owner, Owner deems it advisable to do so to minimize delays and interruptions to train movement. In the event that Owner decides to rerail or clear such derailed, wrecked or otherwise disabled Equipment of User from the Joint Trackage, Owner (to the extent feasible) shall provide User with reasonable and prompt notice of its decision to perform such services (which notice, for purposes of this sentence, shall be reasonable if given by telephonic or voicemail transmission), shall consult with User during the entire process and shall provide User's representatives with reasonable access to the Equipment and the section of Joint Trackage involved in the incident. The reasonable costs and expenses of rerailing or clearing derailed, wrecked or disabled Equipment shall be borne by the parties in accordance with Section 6 of these General Conditions. Services provided under this section shall be billed in accordance with Section 3 of these General Conditions.

2.13 In the event Equipment of User shall be forced to stop on the Joint Trackage, and such stoppage is due to insufficient hours of service remaining among User's employees, or due to mechanical failure of User's Equipment (other than bad ordered Equipment subject to light repairs pursuant to Section 2.11), or to any other cause not resulting from an accident or

derailment (including the failure of User to promptly repair and clear bad ordered Equipment from the Joint Trackage pursuant to Section 2.11), and such Equipment is unable to proceed, or if a train of User fails to maintain the speed required by Owner on the Joint Trackage, or if, in emergencies, disabled Equipment is set out of User's trains on the Joint Trackage (other than bad ordered Equipment subject to light repairs pursuant to Section 2.11), Owner shall have the option to furnish motive power or such other assistance (including but not limited to the right to recrew User's train) as may be necessary to haul, help or push such Equipment, or to properly move the disabled Equipment off the Joint Trackage; provided that Owner (to the extent feasible) provides User with prompt and reasonable notice of its decision to furnish such assistance (which notice, for purposes of this sentence, shall be deemed reasonable if delivered by telephonic or voicemail transmission) and consults with User during the process of providing such assistance. The reasonable costs and expenses of rendering such assistance shall be borne by User. Services provided under this section shall be billed in accordance with Section 3 of these General Conditions.

2.14 User shall pay to Owner reasonable expenses incurred by Owner in the issuance of timetables made necessary solely by changes in the running time of the trains of User over the Joint Trackage. If changes in running time of trains of Owner or third parties, as well as those of User, require the issuance of timetables, then User shall pay to Owner that proportion of the expenses incurred that one bears to the total number of parties changing the running time of their trains. If changes in running time of trains of Owner or third parties, but not those of User, require the issuance of timetables, then User shall not be required to pay a proportion of the expenses incurred in connection therewith.

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**SECTION 3. BILLING.**

3.1 Billing shall be accomplished on the basis of data contained in a billing form mutually agreed to between the parties. Such billing forms shall contain sufficient detail to permit computation of payments to be made hereunder. Billing shall be prepared according to the rules, additives and equipment rental rates as published by the Owner. User shall pay to Owner at the Office of the Treasurer of Owner, or at such other location as Owner may from time to time designate in writing, all the compensation and charges of every name and nature which in and by the Agreement User is required to pay in lawful money of the United States within sixty (60) days after the rendition of bills therefor. Bills shall contain a statement of the amount due on account of the expenses incurred, properties and facilities provided and services rendered during the billing period.

3.2 Errors or disputed items in any bill shall not be deemed a valid excuse for delaying payment, but shall be paid subject to subsequent adjustment; provided, no exception to any bill shall be honored, recognized or considered if filed after the expiration of three (3) years from the last day of the calendar month during which the bill is rendered and no bill shall be rendered later than three (3) years (i) after the last day of the calendar month in which the expense covered thereby is incurred, or (ii) in the case of claims disputed as to amount or liability, after the amount is settled and/or the liability is established. This provision shall not limit the retroactive adjustment of billing made pursuant to exception taken to original accounting by or under authority of the STB or retroactive adjustment of wage rates and settlement of wage claims.

3.3 So much of the books, accounts and records of each party hereto as are related to the subject matter of this Agreement shall at all reasonable times be open to inspection by the

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authorized representatives and agents of the parties hereto. All books, accounts, and records shall be maintained to furnish readily full information for each item in accordance with any applicable laws or regulations.

3.4 Should any payment become payable by Owner to User under the Agreement, the provisions of Sections 3.1 and 3.2 of these General Conditions shall apply with User as the billing party and Owner as the paying party.

3.5 Either party hereto may assign any receivables due it under this Agreement; provided, however, that such assignments shall not relieve the assignor of any rights or obligations under the Agreement.

#### **SECTION 4. COMPLIANCE WITH LAWS.**

4.1 With respect to operation of Equipment on the Joint Trackage, each party shall comply with all applicable federal, state and local laws, rules, regulations, orders, decisions and ordinances ("Standards"), and if any failure on the part of any party to so comply shall result in a fine, penalty, cost or charge being imposed or assessed on or against another party, such other party shall give prompt notice to the failing party and the failing party shall promptly reimburse and indemnify the other party for such fine, penalty, cost or charge and all expenses and reasonable attorneys' fees incurred in connection therewith, and shall upon request of the other party defend such action free of cost, charge and expense to the other party.

4.2 User agrees to comply fully with all applicable Standards concerning Hazardous Materials applicable to its operations. Except with Owner's prior written consent, User covenants that it shall not treat or dispose of any Hazardous Materials on the Joint Trackage. User further agrees to furnish Owner (if requested) with proof, satisfactory to Owner, that User is in such compliance. In the event any accident, bad ordered Equipment, derailment, vandalism or

wreck involving Equipment of or a train operated by User carrying Hazardous Materials shall occur on any segment of the Joint Trackage (for purposes of this Section 4.2 and 4.3 hereinafter called collectively "Derailment"), any report required by federal, state or local authorities shall be the responsibility of User. User shall also advise the owner/shipper of the Hazardous Materials involved in the Derailment, and Owner, immediately.

4.3 In the event of a Derailment, Owner shall assume responsibility for cleaning up any release of Hazardous Materials from User's Equipment in accordance with all federal, state, or local regulatory requirements. User may have representatives at the scene of the Derailment to observe and provide information and recommendations concerning the characteristics of Hazardous Materials released and the cleanup effort. Such costs shall be borne in accordance with Section 6 of these General Conditions. If a Hazardous Materials release caused by a Derailment involving Equipment of or on a train operated by User results in contamination of real property or water on the Joint Trackage or on real property or water adjacent to the Joint Trackage (whether such real property or water is owned by Owner or a third party), Owner shall assume responsibility for emergency cleanup conducted to prevent further damage. User shall be responsible for performing cleanup efforts thereafter. Any costs associated with cleaning up real property or water on or adjacent to the Joint Trackage contaminated by Hazardous Materials from a Derailment shall be borne in accordance with Section 6 of these General Conditions.

4.4 If Hazardous Materials must be transferred to undamaged Equipment or trucks as a result of a release caused by a Derailment involving Equipment of User or on a train operated by User, User shall perform the transfer. PROVIDED, HOWEVER, that if the Hazardous Materials are in damaged Equipment that is blocking the Joint Trackage, Owner, at its option, may transfer the Hazardous Materials with any costs associated with such transfer borne in

accordance with Section 6 of these General Conditions. Transfers of Hazardous Materials by User shall only be conducted after being authorized by Owner.

4.5 The total cost of clearing a Derailment, cleaning up any Hazardous Materials released during such Derailment, and/or repairing the Joint Trackage or any other property damaged thereby shall be borne by the party or parties liable therefor in accordance with Section 6 of these General Conditions.

4.6 In the event of release of Hazardous Materials caused by faulty Equipment or third parties, cleanup will be conducted as stated in Sections 4.2 and 4.3 of these General Conditions.

**SECTION 5. BINDING ARBITRATION.**

5.1 Controversies Subject to Arbitration. Any and all claims, disputes or controversies between User and Owner arising out of or concerning the interpretation, application, or implementation of this Agreement that cannot be resolved by the parties through the Coordination Committee or by negotiations shall be submitted to binding arbitration administered by the American Arbitration Association ("AAA") under its Commercial Arbitration Rules, except as otherwise provided in this Section 5. If the AAA discontinues promulgation of the Commercial Arbitration Rules, the parties shall use the AAA's designated successor rules, and if the AAA does not designate successor rules, the parties shall agree on other rules. The judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof as a final, non-appealable judgment.

5.2 Selection of Arbitrator. In the event a claim, dispute or controversy arises, either party may serve a written demand for arbitration upon the other party. If the claim, dispute or controversy is not resolved by the parties within thirty (30) days after the service of the demand,

the matter shall be deemed submitted to arbitration. If within forty (40) days after service of the demand, the parties have not selected a single arbitrator, each party shall within an additional ten (10) days thereafter select an arbitrator. (In such case, if either party has not selected an arbitrator within ten (10) days after receipt of notice that the other party has selected an arbitrator, the arbitrator selected by the other party shall arbitrate the claim, dispute or controversy.) The two selected arbitrators shall select a third arbitrator. If the two arbitrators are unable to agree upon the third arbitrator within ten (10) days of the selection of the two selected arbitrators, the AAA shall select the third arbitrator. The arbitrator(s) shall be disinterested.

5.3 Expedited Arbitration Schedule.

(a) In the event either party reasonably finds that the issues of any claim, dispute or controversy are likely to directly, imminently, materially and adversely affect human health or safety, either party may request, in the arbitration demand delivered pursuant to Section 5.2, an expedited arbitration procedure as set forth in this Section 5.3 solely for the purpose of obtaining a provisional remedy that by law or in equity could be imposed in a court proceeding against a rail carrier subject to the jurisdiction of the Surface Transportation Board (e.g., temporary restraining order, preliminary injunction or injunction).

(b) Within five (5) days after service of a demand for expedited arbitration, the parties shall agree on an arbitrator. If the parties fail to agree on an arbitrator within such five-day period, each party shall within two (2) days select an arbitrator. In such case, if either party has not selected an arbitrator within two (2) days after receipt of notice that the other party has selected an arbitrator, the arbitrator selected by the other party shall arbitrate the claim, dispute or controversy. The two selected arbitrators shall select a third arbitrator. If the two arbitrators are unable to agree upon the third arbitrator within two (2) days of the deadline for the



selection of the two selected arbitrators, the AAA shall select the third arbitrator. The arbitrator(s) shall be disinterested.

(c) The expedited arbitration hearing shall commence no later than ten (10) days after service of a demand for expedited arbitration and shall be concluded on the same day. The arbitration decision shall be rendered by the arbitrator(s) in writing on or before the day following the arbitration hearing.

(d) Prior to rendering any decision, the arbitrator must find that the issues of the claim, dispute or controversy are likely to directly, imminently, materially and adversely affect human health or safety. In the event the arbitrator finds that the foregoing criteria have not been met, the proceeding shall be dismissed without prejudice and the parties shall proceed with the arbitration procedure and schedule set forth in Sections 5.1 and 5.2; provided, however, that no new demand for arbitration need be served by the party demanding arbitration.

5.4 Pending Resolution. During the pendency of such arbitration proceedings, the business and the operations to be conducted, and compensation for service under this Agreement, to the extent that they are the subject of such controversy, shall continue to be transacted, used and paid in the manner and form existing prior to the arising of such controversy, unless the arbitrator shall make a preliminary ruling to the contrary.

5.5 Cost of Arbitration. Each party solely shall bear the attorneys' fees, costs and expenses incurred by it in connection with such arbitration; provided, however, the arbitrator shall have the power to award attorneys' fees and costs to either party if the arbitrator determines in its reasonable discretion that the position of the other party to the arbitration was frivolous.

**SECTION 6. LIABILITY AND INSURANCE.**

**6.1 Assumption of Responsibility.**

(a) Each of the parties hereto shall assume, bear and pay any and all Losses allocated to it as the responsible party under the terms of this Section 6. Except as otherwise expressly provided in Sections 6.2(b)(v) and 6.4, the responsibility for Losses allocated to each party under this Section 6 is without respect to fault, failure, negligence, misconduct, malfeasance or misfeasance of any party or its employees, agents or servants.

(b) All costs and expenses incurred in connection with the investigation, adjustment and defense of any claim or suit pertaining to a Loss shall be included as part of any Loss for which responsibility is assumed under the terms of this Section 6, but not including salaries or wages and associated benefits of employees of either party or employees of the Operator engaged in such work.

**6.2 Allocation of Responsibilities.**

(a) Except as otherwise expressly provided in Section 6.4, Losses arising out of personal injury (including bodily injury and death) to, or property damage suffered by, an invitee of either party shall be the responsibility of and borne and paid solely by that party regardless of the cause of such Loss, the fault of either party, or the party whose Equipment was involved. For purposes of this paragraph, consultants and contractors of a party and any person who is on Equipment operated by or for the account of a party as a passenger or otherwise (other than an employee of a party engaged in performing duties for that party) shall be deemed to be an invitee of that party. In addition, all persons at any passenger station or passenger-loading platform located on or adjacent to the Joint Trackage shall be deemed to be invitees of User

(other than employees, contractors and consultants, including employees of such contractors and consultants, of UP engaged in performing duties for UP).

(b) Except as otherwise expressly provided in Section 6.4. Losses arising out of personal injury (including bodily injury and death) to, or property damage suffered by, persons other than invitees of either User or UP and casualty losses to property owned by the User or UP shall be the responsibility of and borne and paid by the parties as follows:

- (i) Loss to Equipment and Loss of other property owned, leased or exclusively used by User shall be the responsibility of the User and borne by it.
- (ii) Loss to Equipment and Loss of other property owned, leased or exclusively used by, and freight transported by, UP shall be the responsibility of UP and borne by it.
- (iii) Loss to property jointly used by both parties shall be the responsibility of and borne and paid by the parties as follows:
  - (A) totally by the party whose Equipment was involved in the incident giving rise to the Loss if the Equipment of only one party was involved in the incident giving rise to such Loss;
  - (B) equally by the parties if the Equipment of both parties was involved in the incident giving rise to the Loss; and
  - (C) by the party that owns the real property on which the Loss occurred when no Equipment of either party was involved in the incident, giving rise to such Loss.

- (iv) Losses arising out of personal injury (including bodily injury and death) to, or property damage suffered by, any employee of either party which occurs during the course of employment or while traveling to or from employment shall be the responsibility of and borne solely by the party employing such employee.
- (v) Losses arising out of personal injury (including bodily injury and death) to, or property damage suffered by, any person who is not an employee or invitee of either party (including, without limitation, persons using vehicular and pedestrian crossings and trespassers) including without limitation Losses consisting of property damages suffered by either party hereto arising out of the explosion, combustion, leakage, spillage or release of Hazardous Materials by or in connection with the operations of or service provided by a party or its agents, employees, customers or consignees on the Joint Trackage or other real property, shall be the responsibility of and borne (A) totally by the party whose Equipment was involved in the incident giving rise to such Loss if the Equipment of only one party was involved in the incident giving rise to such Loss, (B) by UP if no Equipment of either party was involved in the incident giving rise to such Loss and the incident occurred on the Joint Trackage; and (C) by both parties in proportion to their relative degrees of fault if the Equipment of both parties was involved in the incident giving rise to such Loss.

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### 6.3 Insurance.

(a) User shall obtain and maintain the insurance coverage specified on Exhibit C, which is attached hereto and made a part hereof. User may self-insure to an amount not to exceed One Million (\$1,000,000.00) provided that the total coverage limits (self insurance plus excess liability insurance) are at least Two Hundred Million Dollars (\$200,000,000.00) per occurrence, with an aggregate limit of not less than Two Hundred Million Dollars (\$200,000,000.00). CGL insurance must be written on ISO occurrence form CG 00 01 12 04 (or a substitute form providing equivalent coverage). User shall provide UP with certified copies of its policies, as well as certificates of insurance and endorsements evidencing the coverage specified on Exhibit C prior to the Passenger Service Commencement Date. The foregoing policy limit and self-insured limit shall be adjusted by the parties every five (5) years to reflect industry standards, liability claim trends and market conditions, but in no event shall the total coverage ever be less than Two Hundred Million Dollars (\$200,000,000.00); provided that any adjustment in the policy limit shall be capped at ten (10) percent per adjustment period.

(b) UP maintains, and shall continue to maintain at all times this Agreement is in effect, at its sole cost and expense, a catastrophic risk management program, allowing for its diverse risk exposures and financial condition, and in keeping with risks assumed by corporations of established size and reputation and consistent with programs of other Class I Railroads [as defined in 49 C.F.R. § 1201, subpart A, General Instruction 1-1(a)]. Such insurance coverage or self insurance shall be at least as comprehensive as the coverage required of User under this Agreement. UP shall provide User with certificates of insurance, or a letter of self insurance, evidencing such insurance coverage or self insurance within thirty (30) days after the Effective Date of this Agreement.

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(c) The general liability insurance or self insurance required by this Section 6 shall provide coverage for personal injury, bodily injury, death and property damage arising out of operations of UP and/or User on the Joint Trackage. Such insurance shall include broad form contractual liability coverage and be applicable to the indemnity provisions set forth in Section 6 hereinafter. Any policy of general liability insurance obtained or maintained by UP shall provide a waiver of subrogation in favor of User and its Operator, and shall name User and its Operator as additional insureds with respect to any liability to be borne by UP pursuant to the provisions of Section 6; to the extent that UP maintains self insurance, UP hereby waives its rights of subrogation against User and its Operator with respect to all claims which are covered by such self-insurance (or would have been covered had UP purchased insurance), and agrees that User and its Operator shall be treated as additional insureds under UP's coverage. Any policy of general liability insurance obtained or maintained by User shall provide a waiver of subrogation in favor of UP, and shall name UP as an additional insured with respect to any liability to be borne by the User pursuant to the provisions of this Section 6.

(d) The insurance (including self insurance) obtained or maintained pursuant to this Section shall be primary with respect to the liability obligations under this Agreement of the party obtaining the insurance and with respect to the interests of all parties added as additional insureds. Any other insurance maintained by an additional insured shall be excess of the coverage herein defined as primary and shall not contribute with it.

(e) Unless otherwise specified herein, the insurance required by this Section 6 shall be maintained by each party for the full term of this Agreement and shall not be permitted to expire or be canceled or materially changed except upon sixty (60) days' written notice to the other party. Each insurance policy required by this Section 6 shall provide that coverage shall

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not be suspended, voided, canceled, or materially reduced in coverage or limits except after sixty (60) days' prior written notice has been given to the insureds, including additional insureds provided for in this Agreement.

(f) Each party shall maintain workers' compensation and employers' liability insurance, with at least minimum required statutory limits, and in compliance with requirements of California and/or federal law.

(g) A failure of either party to obtain or maintain the insurance required by this Section 6 shall not relieve such party of any of its liabilities or obligations under this Agreement.

6.4 Limitations on Indemnification. The provisions of this Section 6.4 shall apply notwithstanding the provisions of Section 6.2 above. "Excluded Conduct" shall mean conduct by a supervisory level or higher employee of one of the parties, when such conduct is alleged in a properly filed complaint by a plaintiff or plaintiffs as the basis for an award of exemplary or punitive damages under California law, and actually results in an award of exemplary or punitive damages by a jury after trial of the issues and exhaustion of judicial appeals. Neither party shall be indemnified for any Loss to the extent such Loss results from its own Excluded Conduct, and in any such case such party shall be responsible for and bear the Loss in proportion to its relative degree of fault and be responsible for and bear exemplary or punitive damages, if any, to the extent resulting from its Excluded Conduct. If a party asserts that the other was guilty of Excluded Conduct and denies liability for indemnification of the other party based thereon, the party asserting such Excluded Conduct shall have the burden of proof in establishing such conduct.

6.5 Scope of Indemnification. In any case where a party is required under the provisions of this Section 6 to bear a Loss, it shall pay, satisfy and discharge such Loss and all judgments or orders that may be rendered by reason thereof and all costs, charges and expenses incident thereto. In addition, such party shall forever indemnify, defend and hold harmless the other party and its directors, officers, agents, employees, shareholders, parent corporation and affiliated companies from, against and with respect to any and all such Losses, irrespective of the fault of negligence of the indemnified party.

6.6 Procedure.

(a) If any claim or demand shall be asserted by any person against an indemnified party under this Section 6, the indemnified party shall, within thirty (30) days after notice of such claim or demand, cause written notice thereof to be given to the indemnifying party, provided that failure to notify the indemnifying party shall not relieve the indemnifying party from any liability which it may have to the indemnified party under this Section 6, except to the extent that the rights of the indemnifying party are in fact prejudiced by such failure. If any such claim or demand shall be brought against the indemnified party and it shall have given notice thereof to the indemnifying party, the indemnifying party shall have the right, at its own expense, to control (including the selection of counsel reasonably satisfactory to the indemnified party) or to participate in the defense of, negotiate or settle, any such claim or demand, and the parties hereto agree to cooperate fully with each other in connection with any such defense, negotiation or settlement. In any event, neither the indemnified party nor the indemnifying party shall make any settlement of any claim or demand which might give rise to liability on the part of the other party under this Section 6 without the prior written consent of the such other party, which consent shall not be unreasonably withheld, conditioned or delayed. If any claim or





demand relates to a matter for which the parties, under the terms of Section 6.2, are to share liability equally or in proportion to their relative degrees of fault, each party shall be entitled to select its own counsel and defend itself against the claim or demand at its sole cost and expense, and neither party shall make any settlement of any such claim or demand without the prior written consent of the other party, which consent shall not be unreasonably withheld, conditioned or delayed.

(b) Subject to the provisions of Section 6.6(a), on each occasion that the indemnified party shall be entitled to indemnification or reimbursement under this Section 6, the indemnifying party shall, at each such time, promptly pay the amount of such indemnification or reimbursement. If the indemnified party shall be entitled to indemnification under this Section 6 and the indemnifying party shall not elect to control any legal proceeding in connection therewith, the indemnifying party shall pay to the indemnified party an amount equal to the indemnified party's reasonable legal fees and other costs and expenses arising as a result of such proceeding.

(c) Any dispute between the parties as to the right to indemnification or the amount to which it is entitled pursuant to such right with respect to any matter shall be submitted to arbitration pursuant to Section 5; provided, however, that if either party or both parties are named as defendants, third party defendants, cross-claim defendants or are otherwise named as parties to a lawsuit or other legal proceeding initiated by a third party, and such proceeding involves or relates to such indemnification rights, then either party shall have the right to pursue the resolution of such indemnification issues in that proceeding instead of through the arbitration procedures set forth in Section 5.

6.7 Third Party Operators. The Third Party Operator shall agree to be bound by the provisions of this Agreement and this Section 6 unless otherwise agreed to in writing by User and UP. For purposes of this Section 6, as between User and UP, the Equipment and actions of any entity (including, without limitation the Third Party Operator) acting on behalf of and for the account of a party hereto shall be deemed to be the Equipment and actions of such party hereto. Nothing contained herein shall be construed to limit or waive the rights of a party hereto to seek indemnification or damages from any entities acting on its behalf for actions of said entities.

6.8 Not For Benefit Of Third Parties. The provisions of this Section 6 are not intended to confer any right, benefit, or cause of action upon any third party and are intended solely to deal with the allocation of liability, if any, as between the parties to this Agreement.

6.9 Enforceability. If any of the provisions of this Section 6 would be prohibited by or unenforceable under the laws of the State of California (including a determination that indemnification under the circumstances involved is against the public policy of the state), the indemnity provided by such provision shall be deemed to be limited to and operative only to the maximum extent permitted by law. Without limitation, if it is determined that any law or public policy of the State of California prohibits the indemnification of a party for its own sole negligence in any instance covered by the provisions of Section 6, those provisions shall be deemed to exclude indemnification for such party's sole negligence but to permit full indemnification, as specified in Section 6, if both parties were negligent.

#### **SECTION 7. GOVERNMENTAL APPROVAL AND ABANDONMENT.**

7.1 Owner and User shall, at their respective cost and expense, initiate by appropriate application, notice or petition and thereafter diligently prosecute proceedings for the procurement of any necessary consent, approval or authority from any governmental agency for the sanction

of the Agreement and the operations to be carried on or conducted by User thereunder. User and Owner agree to cooperate fully to procure any such consent, approval or authority.

7.2 In the event Owner shall be involuntarily dispossessed, through condemnation by a competent public authority or otherwise, of the right to operate upon and maintain any portion of its Joint Trackage and Owner fails or declines to replace said Joint Trackage, Owner shall have no obligation hereunder to provide tracks in replacement of such Joint Trackage for User's use, and User shall have and shall make no claim of any kind, legal or otherwise, against Owner for failure to provide such Joint Trackage for User's use.

7.3 To the extent that Owner may lawfully do so, Owner reserves to itself the exclusive right, exercisable at any time during the life of the Agreement without concurrence of User, to elect to abandon all or any part of the Joint Trackage by giving six (6) months' prior written notice to User of its intention so to do ("Notice of Abandonment"). In the event that Owner obtains authority to abandon its freight operations on the Joint Trackage and a third-party submits an Offer of Financial Assistance ("OFA") to acquire such Joint Trackage, User shall have the right to submit a competing OFA and Owner shall negotiate with User.

#### **SECTION 8. CATASTROPHIC EXPENSE.**

Catastrophic expense to the Joint Trackage, including but not limited to that arising from flood, earthquake or other acts of God, in excess of One Hundred Thousand Dollars (\$100,000.00) (as adjusted on each anniversary of the Effective Date to reflect fifty percent (50%) of the change in the Rail Cost Adjustment Factor - Unadjusted from the corresponding quarter of the prior year) for each occurrence shall be billed and apportioned on the basis of the GTM Handled Proportion for the twelve (12) month period ending immediately prior to the first

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day of the month of the occurrence; provided, however, that in lieu of paying any such amount billed to User, User shall have the right to terminate this Agreement.

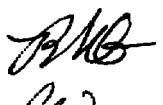
**SECTION 9. SUCCESSORS AND ASSIGNS.**

Except as provided in Section 3.5, this Agreement and any rights granted hereunder may not be assigned in whole or in part by User without the express written consent of Owner; provided, however, that User may assign or sell any of its rights or obligations under this Agreement without the consent of Owner to (i) any entity owned or controlled by, or under common control with, User; or (ii) any municipality or other governmental entity of the State of California; provided, further, that such assignment shall be subject to the terms and conditions of this Agreement, including but not limited to Section 2(b) hereof. This Agreement and the operating rights hereunder shall be binding upon the successors and assigns of the parties.

**SECTION 10. DEFAULT.**

10.1 Notwithstanding the provisions of Section 3 of these General Conditions, either party hereto claiming default of any of the provisions of the Agreement (including these General Conditions) shall furnish notice and written demand to the other party for performance or compliance with the covenant or condition of the Agreement claimed to be in default, which notice shall specify wherein and in what respect such default is claimed to exist and shall specify the particular Section or Sections of the Agreement under which such claim of default is made.

10.2 If the default shall continue for an additional period of thirty (30) days after receipt of such written notice and demand, and such default has not been remedied within said thirty (30) day period, or reasonable steps have not been nor continue to be taken to remedy a failure or default which cannot reasonably be remedied within said thirty (30) day period, and such default relates to the provisions and terms of the Agreement, either party may resort to



arbitration under the provisions of Section 5 heretofore, provided, however, that the arbitrator shall not have the authority to amend, modify or terminate this Agreement.

10.3 Failure of a party to claim a default shall not constitute a waiver of such default. Either party hereto entitled to claim default may waive any such default, but no action by such party in waiving such default shall extend to or be taken to effect any subsequent defaults or impair the rights of either party hereto resulting therefrom.

**SECTION 11. OTHER CONSIDERATIONS.**

11.1 This Agreement and each and every provision hereof is for the exclusive benefit of the parties hereto and not for the benefit of any third party. Nothing herein contained shall be taken as creating or increasing any right in any third person to recover by way of damages or otherwise against any of the parties hereto.

11.2 If any covenant or provision of the Agreement not material to the right of User to use the Joint Trackage shall be adjudged void, such adjudication shall not affect the validity, obligation or performance of any other covenant or provision which is in itself valid. No controversy concerning any covenant or provision shall delay the performance of any other covenant or provision.

11.3 All section headings are inserted for convenience only and shall not affect any construction or interpretation of the Agreement.

11.4 Reference to any agency or other organization shall include any successor agency or organization, and reference to any index or methodology, if such index or methodology ceases to exist or is no longer available, shall include any substantially similar index or methodology selected by the parties or, if the parties fail to agree on such, one determined by binding arbitration under Section 5 of these General Conditions.

11.5 Except as otherwise expressly provided in this Agreement, all notices and other communications under this Agreement shall be in writing and shall be deemed to have been duly given (a) on the date of delivery, if personally delivered to the party to whom notice is given or if sent by overnight courier, or (b) three business days following deposit in the United States mail, postage prepaid, as evidenced by a return receipt. Notices and other communications shall be directed to the parties at the addresses shown below. A party may change its person designated to receive notice or its address from time to time by giving notice to the other party in accordance with the procedures set forth in this Section.

If to User: San Benito Railroad LLC  
ATTN: Philip R. Taylor  
535 Cowper Street  
Second Floor  
Palo Alto, CA 94301  
Telephone: (650) 614-9203  
Facsimile: (650) 833-6903

With copies to: DLA Piper US LLP  
2000 University Avenue  
East Palo Alto, CA 94303-2248  
Attn: Patrick J. McGaraghan  
Telephone: (650) 833-2030  
Facsimile: (650) 833-2001

and K&L Gates LLP  
1601 K Street NW  
Washington, D.C. 20006-1600  
Attn: Kevin M. Sheys  
Telephone: (202) 778-9000  
Facsimile: (202) 778-9100

If to Owner: Union Pacific Railroad Company  
ATTN: Richard Gooch  
50 California Street, Suite 1563  
San Francisco, CA 94111  
Telephone: (415) 439-5345

*AMB*  
*PR7*

With a copy to: General Manager Joint Facilities and Passenger Operations  
Union Pacific Railroad Company - STOP 1180  
1400 Douglas Street  
Omaha, NE 68179-1180

11.6 This Agreement is the entire agreement, and supersedes all prior and contemporaneous agreements, representations, and understandings, of the parties concerning the subject matter hereof. No supplement, modification, or amendment of this Agreement shall be binding unless executed in writing by both of the parties. No waiver of any provision of this Agreement shall be deemed, or shall constitute, a waiver of any other provisions, whether or not similar, nor shall any waiver constitute a continuing waiver. No waiver shall be binding unless executed in writing by the party making the waiver.

11.7 This Agreement may be executed in any number of counterparts, and by different parties in separate counterparts, each of which, when executed and delivered, shall be deemed to be an original and all of which counterparts taken together shall constitute but one and the same instrument.

11.8 This Agreement shall be construed and interpreted in accordance with the laws of the State of California.

11.9 If any legal action or any arbitration or other proceeding is brought for the enforcement or interpretation of this Agreement, or because of an alleged dispute, breach, default or misrepresentation in connection with any of the provisions of this Agreement, the prevailing party or parties shall be entitled to recover reasonable attorneys' fees and other costs in connection with that action or proceeding, in addition to any other relief to which it or they may be entitled.

11.10 Each party will be excused from the performance of any of its obligations hereunder to the other party where such nonperformance is occasioned by any event beyond its

control, which shall include without limitation, any order, rule or regulation of any federal, state, or local governmental body, agency or instrumentality, natural disaster, work stoppage, or civil disorder, provided the party so excused hereunder shall use all reasonable efforts to minimize its nonperformance and to overcome, remedy, cure, or remove such event as soon as reasonably practicable.

A handwritten signature in black ink, appearing to be "J. M. [unclear]", located in the bottom right corner of the page.



## EXHIBIT "C"

### Union Pacific Railroad Contract Insurance Requirements

Sale of Branch Line  
Passenger Operations

Buyer shall, at its sole cost and expense, procure and maintain from the date of sale to the expiration of applicable State(s) and Federal statutes of limitations allowing for claims against the seller (except as otherwise provided in this Agreement) the following insurance coverage:

A. **Commercial General Liability Insurance.** Commercial general liability (CGL) with a limit of not less than \$200,000,000 each occurrence and an aggregate limit of not less than \$200,000,000 CGL insurance must be written on ISO occurrence form CG 00 01 12 04 (or a substitute form providing equivalent coverage).

B. **Umbrella or Excess Insurance** If Buyer utilizes umbrella or excess policies, these policies must "follow form" and afford no less coverage than the primary policy.

### Other Requirements

D. All policy(ies) required above must include Railroad as "Additional Insured" using ISO Additional Insured Endorsement CG 20 26 (or a substitute form providing equivalent coverage). The coverage provided to Railroad as additional insured shall, to the extent provided under ISO Additional Insured Endorsement CG 20 26 provide coverage for Railroad's negligence whether sole or partial, active or passive, and shall not be limited by Buyer's liability under the indemnity provisions of this Agreement

E. Punitive damages exclusion, if any, must be deleted (and the deletion indicated on the certificate of insurance), unless (a) insurance coverage may not lawfully be obtained for any punitive damages that may arise under this agreement, or (b) all punitive damages are prohibited by all states in which this agreement will be performed.

F. Prior to purchase of the property, Buyer shall furnish Railroad with a certificate(s) of insurance, executed by a duly authorized representative of each insurer, showing compliance with the insurance requirements in this Agreement.

G. All insurance policies must be written by a reputable insurance company acceptable to Railroad or with a current Best's Insurance Guide Rating of A- and Class VII or better, and authorized to do business in the state(s) in which the work is to be performed.

H. The fact that insurance is obtained by Buyer or by Railroad on behalf of Buyer will not be deemed to release or diminish the liability of Buyer, including, without limitation, liability under the indemnity provisions of this Agreement. Damages recoverable by Railroad from Buyer or any third party will not be limited by the amount of the required insurance coverage.

**EXHIBIT "D"**

**IMPROVEMENTS TO BE CONSTRUCTED ON COAST MAIN  
AT PURCHASER'S SOLE COST AND EXPENSE  
PRIOR TO THE COMMENCEMENT OF ANY PASSENGER SERVICE**

- a. Remove No. 10 hand throw turnout and replace with a No. 20 power operated turnout and signals at Carnadero;
- b. Upgrade rail and ties, signalize and extend UP's No. 1 track between Corporal and Gilroy (approximately MP 77.85)
- c. Remove No. 20 power operator crossover at MP 78.39;
- d. Install No. 20 power operated crossover at approximately MP 79.5; and
- e. Connect the south end of Caltrain's Gilroy station track to UP's mainline at approximately MP 77.65 including a No. 15 power operated turnout.

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